IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KAMAYA CO., LTD., a Japanese corporation; PACIFIC BUSINESS INVESTMENT, INC., a Washington corporation; FT LIMITED CO., a Japanese corporation; HISA YOSHI YAZAKI, an individual; KAZUO ITO and KIMIKO ITO, husband and wife; TOMOYUKI KATAYAMA, an individual,

Appellants,

v.

AMERICAN PROPERTY CONSULTANTS, LTD., a Japanese corporation; APC, INC., a Delaware corporation; STEVEN P. QUAIVER and MIWAKO QUAIVER, husband and wife; MICHAEL PETERSON and JANE DOE PETERSON, husband and wife; ALAN PETERSON, an individual; GRANCORP, INC., a Washington corporation; MICHAEL HEIJER and JILL HEIJER, husband and wife; JEFF BYNUM and JANE DOE BYNUM, husband and wife; JENNIFER COBB and JANE DOE COBB, husband and wife,

Respondents,

SECOND & BROAD, INC., a Washington corporation; GRANATEN U.S.A., INC., a Washington corporation; STIG MODIG and JANE DOE MODIG, husband and wife; HANS THULIN and JANE DOE THULIN, husband and wife; SVEN-ERIC HANSSON and JANE DOE HANSSON, husband and wife; LENNART MOLVIN and JANE DOE MOLVIN, husband and wife,

Defendants.

NO. 40801-1-I

DIVISION ONE

PUBLISHED OPINION

FILED JUL 27 1998

KENNEDY, C.J. – Plaintiffs—a group of passive investors in a Japanese real estate partnership—appeal the trial court's order compelling them to arbitrate their fraud-in-the-inducement of the partnership agreement claims with American Property Consultants, Ltd., and its officers and directors (the APC Defendants). Plaintiffs contend that their fraud-in-the-inducement claims are not arbitrable under the partnership agreement's arbitration clause because the partnership agreement contains a Japanese choice-of-law provision. And—according to Plaintiffs—under Japanese law, general arbitration clauses do not cover fraud-in-the-inducement claims. Alternatively, Plaintiffs contend that if their fraud-in-the-inducement claims are arbitrable, the trial court erred in not compelling arbitration between them and all of the defendants, including Grancorp, Inc. and its officers and directors (the Grancorp Defendants).

Even assuming that general arbitration clauses do not cover fraud-in-the-inducement claims under Japanese law, a general choice-of-law provision is not an effective means by which to unequivocally exclude an otherwise arbitrable dispute from arbitration. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59-60, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). Therefore, the trial court properly ordered Plaintiffs to arbitrate their fraud-in-the-inducement claims with the APC Defendants.

But the Grancorp Defendants—by filing their Memorandum in Support of the APC Defendants' Motion to Compel Arbitration—in effect joined in the APC Defendants'

Motion to Compel Arbitration. And once a party moves to compel arbitration of a particular dispute and the court determines that the parties have agreed to arbitrate that dispute, the court must order the parties to proceed with arbitration. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217-18, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). Therefore, the trial court abused its discretion by not compelling arbitration between Plaintiffs and the Grancorp Defendants. Accordingly, we affirm in part, reverse in part, and remand with instructions to compel immediate arbitration between Plaintiffs and both the APC Defendants and the Grancorp Defendants, in Tokyo, Japan.

FACTS

The APC Defendants and the Grancorp Defendants, among others, formed Intar Co-op No. 2 ("IC-2")—a Japanese partnership (or kumia)—to purchase, own, and operate a parcel of Seattle real estate. Kamaya Co., Ltd, Pacific Business Investment, Inc., FT Limited Co., Hisayoshi Yazaki, Kazuo Ito, Kimiko Ito, and Tomoyuki Katayama (Plaintiffs)—a mostly Japanese group of passive investors—purchased shares in IC-2. Each investor executed a real estate purchase and sale agreement (in English), a special power-of-attorney (in English), and a partnership agreement (in Japanese). The partnership agreement contains an internal dispute resolution provision—which includes a mandatory arbitration clause—and a general Japanese choice-of-law provision covering essentially the entire agreement.

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After a dispute arose concerning the partnership, the passive investors filed suit against the APC Defendants and the Grancorp Defendants, among others, alleging various violations of the Securities Act of Washington, RCW 21.20, including fraud-in-the-inducement of the partnership agreement as a whole. In response, the APC Defendants filed a Memorandum and Motion to Compel Arbitration requesting the trial court to stay the proceedings and refer Plaintiffs' claims to mediation and arbitration in Japan. The Grancorp Defendants then filed a Memorandum in Support of the APC Defendants' Motion to Compel Arbitration. The trial court granted the APC Defendants' motion, staying the proceedings against all of the defendants but only compelling arbitration between Plaintiffs and the APC Defendants.

Plaintiffs appeal.

DISCUSSION

I. Arbitrability of Plaintiffs' Fraud-in-the-Inducement Claims

[1] Plaintiffs contend that Japanese law governs the arbitrability of their fraud-in-the-inducement of the partnership agreement claims, because the partnership agreement contains a general Japanese choice-of-law provision. The APC Defendants, on the other hand, contend that the Federal Arbitration Act, 9 U.S.C.A. §§ 1-307 (West 1970 and West Supp. 1998) (FAA), governs the arbitrability of Plaintiffs' fraud-in-the-inducement claims, notwithstanding the agreement's Japanese choice-of-law provision, because the partnership agreement is a contract affecting commerce. See 9 U.S.C.A.

§ 2. We reject both of these "all-or-nothing" approaches to resolving the issue of which law governs the arbitrability of Plaintiffs' fraud-in-the-inducement claims. Although the FAA governs whether the parties agreed to arbitrate a particular contractual dispute, the contract's choice-of-law provision is a pertinent factor that courts must consider in applying the FAA.

A. Applicability of the Federal Arbitration Act

[2] In 1925, Congress enacted Chapter 1 of the FAA to abolish "the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1991). Chapter 1 of the FAA applies in both state and federal courts, and covers all contracts within Congress's power to regulate under the Commerce Clause. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); see also 9 U.S.C.A. § 2.

[3] In 1970, Congress enacted Chapter 2 of the FAA, which ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See 9 U.S.C.A. §§ 201-08. Chapter 2 expanded the FAA's coverage "into the field of international commerce, providing for the enforcement of arbitration clauses in commercial transactions in countries that are parties to the Convention." Quasem Group, Ltd. v. W.D. Mask Cotton Co., 967 F. Supp. 288, 290 n.1 (W.D. Tenn. 1997) (citing 9 U.S.C.A.

§ 202). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974).

[4] Chapter 2 mandates that both state and federal courts of the United States enforce the Convention. See 9 U.S.C.A. §§ 201, 205. "Article II of the Convention imposes a mandatory duty on the courts of a Contracting State to recognize, and enforce an agreement to arbitrate unless the agreement is 'null and void, inoperative or incapable of being performed.'" Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 959 (10th Cir. 1992) (citing 9 U.S.C.A. § 201 note). All actions and proceedings falling under the Convention are "deemed to arise under the laws and treaties of the United States." 9 U.S.C.A. § 203. But Chapter 1 of the FAA applies to cases brought under Chapter 2 only to the extent that Chapter 1 "is not in conflict with [Chapter 2] or the Convention as ratified by the United States." 9 U.S.C.A. § 208.

[5] Plaintiffs do not dispute that the IC-2 partnership agreement—which was marketed and promoted in Japan to elicit investors in Seattle real estate—is a commercial transaction affecting international commerce. And all possibly interested

nations—the United States, Japan, and Sweden[1]—are Contracting States to the Convention. See 9 U.S.C.A. § 201 note. Therefore, Chapter 2 of the FAA and the Convention—and Chapter 1 of the FAA to the extent it does not conflict—govern the arbitrability of Plaintiffs' fraud-in-the-inducement claims. See McDermott Int'l, Inc. v. Lloyds Underwriters, 944 F.2d 1199, 1208 (5th Cir. 1991) ("The parties recognize that this suit concerns an arbitration agreement and is not entirely between United States citizens, so [Chapter 2] governs this case.").

For example, in Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3d Cir. 1978), the court was asked to decide whether a West German corporation and a Pennsylvania corporation should be required to arbitrate their contractual dispute. The court held, notwithstanding ordinary choice-of-law analysis, that the federal substantive law of arbitrability governed whether the parties agreed to arbitrate their dispute:

> There has been much discussion by the parties concerning the applicability of German law or Pennsylvania law in the resolution of this dispute. It may well be that the question of which law is to be applied will have to be answered in deciding the merits of the underlying controversy. However the case before us presents only the issue of the arbitrability of that controversy. When a contract involves "commerce", as this one does, whether a "suit or proceeding is referable to arbitration . . . under an agreement [to arbitrate] pursuant to the federal Arbitration Act, 9 U.S.C. § 3, or to the Convention on Recognition and Enforcement of Foreign Arbitral Awards Art. II, § 3 and 9 U.S.C. § 206, is clearly a matter of federal substantive law. Thus, the question of whether, in contracts involving commerce, there is an agreement to arbitrate an issue or dispute upon which suit has been brought is governed by federal law.

[1] At oral argument, counsel for the Grancorp Defendants indicated to this court that Grancorp, Inc. is controlled by Swedish nationals.

Concomitantly, questions of interpretation and construction of such arbitration agreements are similarly to be determined by reference to federal law. As the court in Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972), stated, "[o]nce a dispute is covered by the [federal Arbitration] Act, federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability, and enforceability."

It is true that, if the parties agree that certain disputes will be submitted to arbitration and that the law of a particular jurisdiction will govern the resolution of those disputes, federal courts must effectuate that agreement. However, whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law.

Id. at 43 (citations and footnotes omitted) (alterations in original). In other words, the "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)).

As Plaintiffs correctly point out, whether the FAA or Japanese arbitration law governs the arbitrability of their fraud-in-the-inducement claims is not a question of federal preemption: "The Supremacy [C]lause applies to states and is inapplicable to considerations of federal law versus foreign law." Al-Kurdi v. United States, 25 Cl. Ct. 589, 601 n.3 (1992); cf. Southland Corp. v. Keating, 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (holding that the FAA preempts contrary state arbitration law under

the Supremacy Clause). And contractual choice-of-law provisions are ordinarily valid under the FAA. See generally Ford v. NYLCare Health Plans, Inc., 141 F.3d 243, 248 n.8 (5th Cir. 1998) (rejecting argument that, notwithstanding agreement's choice-of-law provision, "substantive federal law governs the scope of arbitration clause whenever the agreement involves commerce"). But it is axiomatic that courts must have some law to apply when initially determining whether the parties agreed to arbitrate a particular dispute. The FAA provides courts with this necessary analytical framework. Indeed, Plaintiffs themselves argue that the partnership agreement's Japanese choice-of-law provision evidences the parties' intent to exclude fraud-in-the-inducement claims from arbitration by citing to FAA cases. Therefore, we hold that although the FAA does not preempt the partnership agreement's Japanese choice-of-law provision, "whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law." Becker, 585 F.2d at 43.[2]

[2] Our holding is consistent with the U.S. Supreme Court's pronouncement on the importance of enforcing foreign choice-of-law provisions in the context of international transactions:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts[.] We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Mitsubishi, 473 U.S. at 629 (internal quotation marks and citation omitted). That is, our holding requires courts to consider foreign choice-of-law provisions in determining the arbitrability of a particular dispute, and permits an arbitrator or court—absent a conflict-of-law impediment—to apply the law chosen by the parties to the underlying dispute.

B. Application of the Federal Arbitration Act

[8] Questions of arbitrability, like all questions of law, are reviewed de novo. First Options, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995); ACF Property Management, Inc. v. Chaussee, 83 Wn. App. 913, 919, 850 P.2d 1387 (1993). Courts must consider four guiding principles when determining if two parties agreed to submit a particular dispute to arbitration:

> (1) the duty to submit a matter to arbitration arises from the contract itself; (2) the question of whether parties have agreed to arbitrate a dispute is a judicial one unless the parties clearly provide otherwise; (3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issue; and (4) arbitration of disputes is favored by the courts.

W.A. Botting Plumbing & Heating Co. v. Constructors-Pameo, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987) (citing AT & T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986)). "The federal policy favoring arbitration is even stronger in the context of international transactions." Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993).

[9] "In general, although the intentions of the parties as expressed in the agreement control, 'those intentions are generously construed as to issues of arbitrability.'" ML Park Place Corp. v. Hodreen, 71 Wn. App. 727, 738, 862 P.2d 632 (1993). In other words, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone, 460 U.S. at 24-25. Therefore, a contractual dispute is arbitrable unless it can be said "with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." ML Park, 71 Wn. App. at 738 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)).

[10] In this case, the IC-2 partnership agreement contains a broad and inclusive internal dispute provision that ultimately requires arbitration of all unresolvable disputes and differences between partners, in Tokyo, Japan:

> 1. Any question concerning the interpretation of this Partnership Agreement or any dispute or difference in opinions arising from time to time among the partners of this partnership pertaining to the operation of this partnership or any right or obligation with respect to this partnership shall first be presented to the Board of Directors, and the Board of Directors shall render a decision and notify the partners of the partnership in writing.
>
> 2. Any partner of this partnership dissatisfied with such decision by the Board of Directors shall attempt to reach an amicable resolution through mutual consultation with pertinent parties.
>
> 3. Any dispute or difference in opinions which is not resolved within 90 days after a decision is rendered by the Board of Directors and notified to pertinent parties may[3] be referred to one arbitrator in Tokyo, Japan, and such arbitration shall definitively resolve such dispute or difference in accordance with the then effective rules of the International Commercial Arbitration Association.

Clerk's Papers at 124. And Plaintiffs do not dispute that under the FAA, general arbitration clauses ordinarily cover claims of fraud-in-the-inducement of a contract as a whole. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); but see Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963, 965 (S.D.N.Y. 1996) (questioning the continued vitality of Prima Paint after the Court's decision in First Options, 514 U.S. 938); Northcom, Ltd. v. James, 694 So. 2d 1329, 1332 n.1 (Ala. 1997) (same). Therefore, absent the partnership agreement's Japanese choice-of-law provision, Plaintiffs' fraud-in-the-inducement claims clearly would be arbitrable.

[11] The U.S. Supreme Court has held that because arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit[,] [parties] may specify by contract the rules under which that arbitration will be conducted." Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). "It follows, then, that if the parties may select rules of arbitration through the use of choice-of-law provisions, so too may they specify the law governing interpretation of the scope of the arbitration clause." Ford, 141 F.3d at 248.

[12] Relying on this line of reasoning, Plaintiffs contend that the partnership agreement evidences the parties' intent to exclude fraud-in-the-inducement claims from the agreement's general arbitration clause, because the agreement contains a general Japanese choice-of-law provision:

> Excluding the provisions contained in Article 6 hereof, the partners of this partnership hereby agree that this Partnership Agreement shall take effect under and shall be construed in accordance with Japanese law and that the rights and

[3] Although the agreement employs the Japanese translation of the word 'may', the parties agree that the arbitration clause is mandatory if the dispute falls within the purview of the internal dispute resolution provision.

obligations of the partners of this partnership shall be governed by Japanese law.

Clerk's Papers at 123. And—according to Plaintiffs—under Japanese law, general arbitration clauses do not cover fraud-in-the-inducement claims. Appellants' Br. at 15.

[15] The U.S. Supreme Court, however, rejected a very similar argument in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). In that case, the contract contained a general arbitration clause and a New York choice-of-law provision that governed "the entire agreement." Id. at 58-59. "New York law allows courts but not arbitrators, to award punitive damages." Id. at 53. Nonetheless, the arbitrators awarded the Mastrobuonos $402,000 in punitive damages. Id. at 54.

On appeal, Shearson Lehman argued that "the [New York] choice-of-law provision in their contract evidence[d] the parties' express agreement that punitive damages should not be awarded in the arbitration of any dispute arising under their contract." Id. at 56. But the U.S. Supreme Court interpreted the contract's New York choice-of-law provision as having two reasonable interpretations and not as an "unequivocal exclusion of punitive damages claims" from the contract's general arbitration clause:

> Even if the reference to "the laws of the State of New York" is more than a substitute for ordinary conflict-of-laws analysis and, as respondents urge, includes the caveat, "detached from otherwise-applicable federal law," the provision might not preclude the award of punitive damages because New York allows its courts, though not its arbitrators, to enter such awards. In other words, the provision might include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals.

Id. at 59-60 (citation and footnotes omitted). Therefore, the Court concluded that U.S. policy favoring arbitration dictated that the ambiguity created by the choice-of-law provision be resolved in favor arbitration. Id. at 62. Accordingly, the Court affirmed the arbitrators' award of punitive damages. Id. at 64.

In Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 927-28 (6th Cir. 1998), Ferro Corporation and Garrison Industries entered into a manufacturing agreement that contained a standard arbitration clause and a general Ohio choice-of-law provision. When a dispute arose concerning the contract, Garrison filed a demand for arbitration, alleging breach of contract. Id. at 931. Ferro claimed as a defense that Garrison fraudulently induced it to enter the contract. Id. After various procedural maneuvers by both parties, the United States District Court for the Northern District of Ohio denied Ferro's motion to stay arbitration, but held that "Ohio law governed the issues to be arbitrated, and, that under Ohio law 'fraudulent inducement' is not an arbitrable claim." Id. at 931. Accordingly, the District "enjoined the arbitration panel from 'resolving the ultimate question of whether the contract at issue in this case has been fraudulently induced.'" Id. at 929.

The arbitrators proceeded to resolve Garrison's breach of contract claim and found Ferro "liable to Garrison for an amount to be determined at a subsequent hearing." Id. at 930. The District Court then held a bench trial on Ferro's fraud-in-the-

inducement claims and found that "Garrison had fraudulently induced Ferro to enter the agreement[.]" Id. The arbitration panel proceeded to award damages on Garrison's breach of contract claim, but the trial court subsequently vacated the award. Id. at 931. On review, the Sixth Circuit Court of Appeals held that "[u]nder the Supreme Court's interpretation of the FAA, the issue of fraudulent inducement of the entire contract is an issue to be resolved by the arbitration process, in the absence of evidence that the contracting parties intended to withhold the issue from arbitration." Id. (citing Prima Paint, 388 U.S. at 403). And under the Supreme Court's reasoning in Mastrobuono, 514 U.S. 52 the contract's general Ohio choice-of-law provision did not unequivocally exclude Ferro's fraud-in-the-inducement claims from the contract's standard arbitration clause. Id. at 937. In other words, the court reasoned that "if Ferro had intended to either exclude the issue of fraudulent inducement from arbitration, or only allow for arbitration to the extent allowed under Ohio law, it could have written this provision into the [arbitration] clause." Id. at 938. Therefore, the Court of Appeals reversed the District Court and ordered the parties to arbitrate Ferro's fraud-in-the-inducement claims. Id. at 939.

[16] Likewise, the IC-2 partnership agreement's general Japanese choice-of-law provision neither unequivocally excludes fraud-in-the-inducement claims from its general arbitration provision nor unequivocally invokes Japanese arbitration law. That is, the Japanese choice-of-law provision can reasonably be read as merely specifying

that Japanese substantive law be applied to the underlying disputes related to the partnership agreement: "[T]he partners of this partnership hereby agree that this Partnership Agreement shall take effect under and shall be construed in accordance with Japanese law and that the rights and obligations of the partners of this partnership shall be governed by Japanese law." Clerk's Papers at 123.[4] Therefore, following the Court's reasoning in Mastrobuono, 514 U.S. 52, the IC-2 partnership agreement's general Japanese choice-of-law provision does not unequivocally exclude Plaintiffs' fraud-in-the-inducement claims from the agreement's general arbitration clause. And it cannot be said "with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." ML Park, 71 Wn. App. at 739 (quoting United Steelworkers, 363 U.S. at 582-83)

[15] Unlike Mastrobuono, however, this conclusion does not construe the ambiguous language against its presumed drafters, i.e., IC-2's corporate promoters. See Berg v. Hudesman, 115 Wn.2d 657, 677, 801 P.2d 222 (1990) (noting that courts ordinarily construe ambiguities in a document against its drafters). But the Mastrobuono Court merely cited "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it" as further

[4] The contract in Ford, 141 F.3d 243, is distinguishable from the IC-2 partnership agreement and the contract in Ferro, 142 F.3d 926, because the Ford contract's arbitration clause specifically invoked Texas arbitration law. Compare Ford, 141 F.3d at 248 ("Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the Texas General Arbitration Act[.]") with Ferro, 142 F.3d at 931 n.7 ("The Parties hereto agree that all of the provisions of this Agreement and any questions concerning its interpretation and enforcement shall be governed by the laws of the State of Ohio, USA exclusive of its choice of law rules[.]")

support for its conclusion that the punitive damages award was arbitrable. Mastrobuono, 514 U.S. at 62-63. Therefore, this consideration alone does not render a conclusion of arbitrability inconsistent with the Court's decision in Mastrobuono. Accordingly, even assuming that general arbitration clauses do not cover fraud-in-the-inducement claims under Japanese law, the strong federal policy favoring arbitration—especially in the context of international commercial transactions—dictates that Plaintiffs' fraud-in-the-inducement claims be submitted to arbitration in Tokyo, Japan.

II. Arbitrability of Plaintiffs' Claims Against Grancorp Defendants

Plaintiffs contend that if their fraud-in-the-inducement claims are arbitrable, the trial court erred by not compelling arbitration against all of the defendants, including the Grancorp Defendants. The Grancorp Defendants, on the other hand, contend that the trial court properly refused to compel arbitration against them because they did not join the APC Defendants' Motion to Compel Arbitration. Alternatively, the Grancorp Defendants contend that even if they did join APC Defendants' motion, the trial court's order staying the proceedings against all the defendants but only compelling arbitration between Plaintiffs and the APC Defendants was within the trial court's discretion to efficiently manage the case.

The APC Defendants' Memorandum and Motion to Compel Arbitration requested the trial court to stay the proceedings and refer Plaintiffs' claims to mediation and arbitration in Japan. The Grancorp Defendants' Memorandum in Support of the APC

Defendants' Motion to Compel Arbitration stated that the Grancorp Defendants understood the partnership agreement as requiring arbitration of Plaintiffs' claims and concurred with the APC Defendants' motion. Therefore, as Plaintiffs contend, the Grancorp Defendants in effect joined in the APC Defendants' Motion to Compel Arbitration.

As the Grancorp Defendants point out, however, trial courts are afforded considerable discretion in managing their civil caseloads "to achieve the orderly and expeditious disposition of cases." Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995), review denied, 128 Wn.2d 1008 (1996). But once a party moves to compel arbitration of a particular dispute and the court determines that the parties have agreed to arbitrate that dispute, the court must order the parties to proceed to arbitration "save upon such grounds as exist at law or in equity for the revocation of any contract." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217-18, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (quoting 9 U.S.C.A. § 2). This is especially true when the arbitration agreement falls under the Convention:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

9 U.S.C.A. § 201 note (Convention on the Recognition and Enforcement of Foreign Arbitral Awards; June 10, 1958, art. II, para. 3); accord Ledee v. Ceramiche Ragno, 684

F.2d 184, 187 (1st Cir. 1982). The Grancorp Defendants have not asserted any legal or equitable grounds for revoking the partnership agreement as a whole or the arbitration clause in particular. Therefore, because the trial court properly found that the partnership agreement required arbitration of Plaintiffs' fraud-in-the-inducement claims, the trial court abused its discretion by not compelling arbitration between Plaintiffs and the Grancorp Defendants.

CONCLUSION

The trial court properly ordered Plaintiffs to arbitrate their fraud-in-the-inducement claims with the APC Defendants. But the trial court abused its discretion by not compelling arbitration between Plaintiffs and the Grancorp Defendants. Therefore, we affirm the trial court in part, reverse in part, and remand with instructions to compel immediate arbitration between Plaintiffs and both the APC Defendants and the Grancorp Defendants, in Tokyo, Japan.

Kennedy, C.J.

WE CONCUR:

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MEALEY'S International Arbitration Report

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

U.S. TITAN, INC.,

Petitioner,

- against -

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

- X

96 Civ. 8936 (WCC)

OPINION #98,028 WP
AND ORDER

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Copies Mailed to Counsel of Record

TITAN

Conner, Senior D.J.:

This case is currently before the Court on petitioner U.S. Titan, Inc.'s ("Titan") motion for a summary determination of the making of a binding charter party agreement between Titan and respondent Guangzhou Zhen Hua Shipping Co., Ltd. ("Guangzhou"), and to compel arbitration on Titan's claim for breach of contract, pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 4. Guangzhou has cross-moved to dismiss the action for lack of jurisdiction and improper venue under Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(3), or alternatively, to stay the proceedings pursuant to 9 U.S.C. § 3 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. (the "Convention").

For the reasons discussed below, the Court finds that the parties have entered into a binding charter party agreement that requires arbitration of their dispute; grants petitioner's motion to compel arbitration; and denies respondent's cross-motion to dismiss or stay the action.[1]

[1] The Court will "stay" the action to the extent that it orders arbitration in London concerning Guangzhou's alleged breach of the charter party. See 9 U.S.C. § 3. It does not, however, stay the action with respect to the summary determination of a charter party.

BACKGROUND

The facts, according to plaintiff, are as follows. Titan is a corporation organized under the laws of Texas, with its principal place of business in Pelham, New York. Guangzhou is a state-owned corporation organized under the law of the People's Republic of China, with its principal place of business in Canton, China. At all pertinent times, Guangzhou owned and operated the M/T BIN HE (the "BIN HE"), an ocean-going Chinese-flag tanker.[2]

On or about August 22, 1995, the parties began negotiating a time charter[3] of the BIN HE, through their respective brokers -- Seagos Company, Inc. ("Seagos") of Stamford, Connecticut, on behalf of Guangzhou, and Seabrokers, Inc. ("Seabrokers"), also of

[2] Guangzhou claims that it did not own the BIN HE and merely chartered it from Zhu Hai Shipping Enterprise Ltd., its true owner. (Chen Reply Aff. ¶ 9.) Whether Guangzhou was BIN HE's owner, however, has little if anything to do with its obligations under the alleged charter party. To the extent that ownership of the BIN HE may be relevant, it can be determined by the arbitrator, who, as we conclude, must decide all disputes arising under the charter party. See Dover S.S. Co. v. Summit Indus. Corp., 148 F. Supp. 206, 209 (S.D.N.Y. 1957); see also Tarstar Shipping Co. v. Century Shipline, Ltd., 451 F. Supp. 317, 321-22 (S.D.N.Y. 1978) (charter existed between parties that negotiated agreement, even though "owner's name . . . was not mentioned when the vessel was fixed and confirmed by telex"), aff'd, 597 F.2d 837 (2d Cir. 1979).

[3] A charter party is "a contract by which an entire ship or some principal part thereof is let to a merchant . . . ." Jhirad & Sann, 1 Benedict on Admiralty § 225 (7th ed. 1981). In a charter party, the terms and conditions of the lease of a vessel by an owner to a charterer are set out. Gilmore & Black, The Law of Admiralty § 4-1 (2d ed. 1975). With a time charter, "the owner[] . . . continues to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period." Id.

Stamford, on behalf of Titan. The charter contained three "subjects," or conditions: (1) Titan's satisfactory inspection of the BIN HE; (2) the release of the vessel from its previous charterer, "Canaro"; and (3) the approval of the charter party by Titan's board of directors within three days of the board's receipt of the final inspection report.[1] (See Pet'r Exh. 29.) On September 22, 1995, Guangzhou offered to charter the BIN HE to Titan for 12 months at $15,250 per day, with an option for an additional twelve months at $15,750 per day. During the next few days, the parties negotiated different periods and rates, as well as several other terms. Ultimately, on September 26, Guangzhou responded with a "firm counter offer" as follows:

". . . Accept/Except:

Period - 6 mos. plus/minus 30 days at CHOPT

CHOPT next 12 mos. . . .

Rates - $15,250 first period

Optional $15,750 second period."

(Pet'r Exh. 18.)

That same day, Titan informed Seabrokers that "Charterers are in agreement and accept Owner[']s last offer." (Pet'r Exh. 19.) Seabrokers then sent Titan a fixture telex "recap[ping] Owners and Charterers' agreement." (Pet'r Exh. 1.) The agreement was based on the "Shelltime 4 Time Charter," a standard time charter, and contained the above subjects. (Id.) The Shell Time 4 Charter contained an arbitration clause, providing for arbitration in London, at the election of either party. (See Pet'r Exh. 4.)

Thereafter, the BIN HE was dry-docked in Hong Kong and inspected by Denholm Ship Management (Overseas) Ltd. ("Denholm"). On October 19, Titan received Denholm's initial report. (Warfield Aff. ¶ 16.) On October 23, Titan informed Seabrokers that it had concerns about the seaworthiness of the BIN HE, but that it was awaiting Denholm's final inspection report. (Id. ¶ 18 & Exh. 10.) Then, on October 25, Titan informed Seabrokers that it had received the full Denholm report and that it had "lift[ed its] inspection subject." (Pet'r Exh. 34.) It also stated that Titan "now look[ed] to [the] Owners to lift their Canaro withdrawal subject . . . . [and that] the Titan board will make its decision within . . . three working days after the lifting of this subject per [the] 9/26 agreement." (Id.) On October 26, 1995, Seabrokers informed Titan that the BIN HE had been withdrawn from Canaro. (See Pet'r Exh. 30.) Titan thereupon replied that it would respond with board approval "by close of New York [business] Monday Oct. 30." On October 27, 1995, Titan notified Seabrokers that its board had approved the charter. (Pet'r Exh. 21.)

Guangzhou presents a slightly different version of events. According to Guangzhou, Titan rejected the BIN HE by its October 23 telex, which informed Seagos that the vessels' machinery spaces were "in terrible condition," and that the vessel was not "up to an acceptable trading standard." (Chen Aff. ¶ 10 & Exh. 5.) Seagos informed Seabrokers that in view of Titan's rejection of the vessel, the conditions to which the charter had been subject had failed to occur. (Id. ¶ 10 & Exh. 6.)

Additionally, Guangzhou maintains that on October 24, Seabrokers confirmed that Titan had rejected the vessel, and that the subjects had therefore failed. (Id. ¶ 11 & Exh. 7.) Moreover, according to Guangzhou, on October 25, "Titan reversed its position and attempted to assert that the vessel had not failed the inspection." Guangzhou claims that it then terminated all negotiations with Titan. (Id. ¶ 13 & Exh. 9.)

On November 1, in a facsimile to Titan, Seagos suggested arbitration to resolve the dispute. (See id. ¶¶ 16-17 & Exh. 12.) Later that day, Titan proposed that the parties submit the matter "to three arbitrators in New York who would have 45 days . . . to issue a ruling on the threshold issue of whether the parties entered into a binding agreement on September 26 subject to conditions that were subsequently fulfilled." (Pet'r Exh. 39.) On November 2, Seabrokers responded that the "Shell Time 4 Canaro proforma is very clear on the simplified arbitration which has been agreed by U.S. Titan and is agreeable to Southern Shipping as well. There is no need for a separate arbitration agreement at all." (Pet'r Exh. 40.)[2] Titan then sent "formal written notice of

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[1] Defendant, on the other hand, takes the view that the board was to approve the proposed charter party within three days of the actual inspection of the BIN HE.

[2] Titan claims that Seagos did not understand the reference to "Southern Shipping," and to have believed that the reference to "Shell Time 4 Canaro" referred to the charter between Guangzhou and Canaro, which, in part, was to be assumed by Titan. Compare

Arbitration" to Seagos, advising it that arbitration was to follow "the Shell Time 4 clause 41(c) of Canaro/Titan Charter Party." (Pet'r Exh. 41.) On November 7, Titan sent a follow-up fax to Seagos, requesting confirmation that arbitration would be held under clause 41(c) of the charter party. (Pet'r Exh. 42.) Seagos replied, "London arbitration in accordance with Clause 41(c)." (Pet'r Exh. 43.) On November 9, Titan once again faxed Seagos, asking for confirmation that "arbitration proceedings in London are to [be] . . . in accordance with Clause 41(c) of the Shell Time 4 Guangzhou/Titan Proforma, which is based on the 'Canaro' Charter." (Pet'r Exh. 44.) Seagos replied that "both parties" had agreed to London arbitration "to ascertain whether there is a charter between Guangzhou . . . and . . . Titan." (Pet'r Exh. 45.) Titan then sent another fax to Seagos, stating that "arbitration in London is acceptable per the agreement." (Pet'r Exh. 46.)

Following these exchanges, the parties attempted to select a London arbitrator. In one such communication, sent directly from Guangzhou to Seabrokers, Guangzhou reiterated that it had agreed to submit the matter to arbitration "pursuant to the Shell Time 4 Clause 41." (Resp. Exh. 18.) No agreement was reached as to the identity of the arbitrators.

On February 7, 1996, Titan again wrote to Seagos. Among other things, the fax stated that Titan would "not agree to arbitration outside of the binding Titan/Guangzhou charter." (Pet'r Exh. 47 (emphasis in original).) Seagos did not reply. Instead, Titan received a fax from Guangzhou, which stated that Titan was "not allowed to be in breach of the ad hoc arbitration clause which is actually running." The fax also referred to an "alleged C/P." (Resp. Exh. 20.) Titan responded that since the parties could not agree on whether a valid charter party existed, it was "free to initiate this issue here [in New York]." (Piskora Aff. ¶ 12.)

explains that the reference to Southern Shipping was a typographical error, due to the fact that Seagos also represents Southern Shipping in brokering charterers. (See Chen Reply Aff. ¶ 8.)

DISCUSSION

Titan now petitions this Court pursuant to section 7 of the FAA (1) to determine summarily that there exists a binding charter between the parties and (2) to compel arbitration for breach of that agreement. For the reasons discussed below, the Court declines to dismiss the case for lack of jurisdiction or for improper venue, and holds that the parties have entered into a binding charter. Furthermore, the Court will compel arbitration in London to enforce the agreement.

I. Relevant Legal Standards

A. Motion to Dismiss Under Rules 12(b)(1), 12(b)(3)

On a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all factual allegations in the Complaint as true and "refrain from drawing inferences in favor of the party contesting jurisdiction." Serrano v. 900 5th Ave. Corp., --- F. Supp.2d ---, No. 97 Civ. 5829, 1998 WL 241623, at *1 (S.D.N.Y. May 13, 1998) (citing Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)). The Court is not confined to the Complaint, however. It may consider "evidence outside the pleadings, such as affidavits." Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991), vacated on other grounds, 505 U.S. 1215 (1992); accord Kamen v. AT&T, 791 F.2d 1006, 1011 (2d Cir. 1986).[4] Likewise, the Court may consider affidavits in deciding a Rule 12(b)(3) motion for improper venue. See ESI, Inc. v. Coastal Power Prod. Co., 995 F. Supp. 419, 422 (S.D.N.Y. 1998).

[4] Thus, the standard for deciding a motion to dismiss for lack of subject matter jurisdiction is akin to that for summary judgment under Rule 56(e). Rule 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters sated therein . . . . The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion [] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . .

Rule 56(e) requires that the non-moving party oppose the motion with any of the evidentiary materials listed in Rule 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

B. Motion to Dismiss Under Rule 12(b)(2)

In determining a motion to dismiss for lack of personal jurisdiction, the Court also looks beyond the pleadings to affidavits submitted by the parties, considers the evidence in the light most favorable to the plaintiff, and resolves all doubts in its favor. PDK Labs. Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). Prior to discovery, "the [plaintiff] need persuade the Court only that its factual allegations constitute a prima facie showing of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990).

II. Jurisdiction

Titan claims that there exists subject matter jurisdiction under § 9 of the FAA. Guangzhou, on the other hand, argues that it is immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). The Court concludes that it has subject matter jurisdiction under 28 U.S.C. § 1330(a), because Guangzhou waived its immunity under the FSIA.

A. Subject Matter Jurisdiction Under the FSIA

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. A defendant corporation that is owned entirely by a foreign state is also immune from the jurisdiction of the Court. See id. §§ 1603(a), 1603(b)(2), 1604. If the immunity provisions of the FSIA are applicable, the Court is divested of subject matter jurisdiction over an action. NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2d Cir. 1993).

It is undisputed that defendant Guangzhou is wholly owned by the People's Republic of China. Therefore, in order for the Court to have jurisdiction over Titan's motion, there must be an applicable exception to foreign sovereign immunity under the FSIA. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). The burden is on Titan "to go forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (internal citations omitted). If an exception applies, the Court has subject matter jurisdiction over Guangzhou under 28 U.S.C. § 1330.

1. Arbitration Exception

The Court holds that Guangzhou has waived its immunity under § 1605(a)(6)(B) of the FSIA.[7] Section 1605(a)(6)(B) provides an exception to immunity in cases where a foreign state or sovereign entity has agreed to arbitrate a dispute and the arbitration agreement is or may be governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. Congress has authorized the district courts to compel arbitration under the Convention in accordance with the agreement, including arbitration at sites outside the U.S. Id. § 203.

Here, Titan alleges that it entered into a charter party with Guangzhou that provided for arbitration in London, which is enforceable under the Convention. Guangzhou contends that the charter party was never formed, because Titan never completed the subjects precedent to the agreement. The U.S. and China are both parties to the Convention.

Cargill International S.A. v. M/T Pavel Dybenko is on point. In Cargill, the Second Circuit Court of Appeals considered whether a district court had subject matter jurisdiction to determine whether a charter party, which contained an arbitration clause, applied in a particular case between a sovereign-owned company and a plaintiff that was a third party to the charter. The Court held that the district court had "jurisdiction to determine jurisdiction," and directed the court to consider "whatever evidence has been submitted" by the parties. 991 F.2d at 1019

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[7] Although Titan has not raised § 1605(a)(6)(B) as a basis for subject matter jurisdiction, the Court may consider it sua sponte. See American Centennial Ins. Co. v. Seguros La Republica, S.A., No. 91 Civ. 1235, 1996 WL 304436, at *15 n. 23 (S.D.N.Y. June 5, 1996); Gabay v. Mostazafan Found. of Iran, 151 F.R.D. 250, 255 n.8 (S.D.N.Y. 1993) (citing Verlinden, 461 U.S. at 493 n. 20), aff'd, (2d Cir. 1994).

(citations omitted). The Court reasoned that regardless of whether there existed an agreement to arbitrate that could be enforced by the plaintiff -- the alleged beneficiary of the agreement -- the Court had jurisdiction to determine whether "the arbitration agreement in the Charter Party was intended to benefit [the plaintiff]." Id. Of particular importance to the Court was that "the Convention should be broadly interpreted," "when . . . read together with the FSIA[]." Id. at 1018. It is significant that Cargill was not seeking to enforce an arbitral award, but to determine whether it was a beneficiary of the contract and to enforce the arbitration agreement. Compare id. at 1017-18 with Spetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 577-79 (2d Cir. 1993) (enforcing arbitration award while distinguishing cases where plaintiff sought to have award enforced from cases in which there had been no award).

Cargill is applicable here, where the parties have allegedly entered into an agreement to arbitrate which is governed by the Convention and which is enforceable by the Court. See 991 F.2d at 1020 ("If [the plaintiff] is found to be a third party beneficiary to the Charter Party, it may be proper for the district court to enforce the arbitration agreement against [the defendant]"); see also 9 U.S.C. § 206 (allowing court to order arbitration under the FAA). According to Cargill, the FSIA must be read with the FAA to give the Convention a broad interpretation. Accordingly, the Court concludes that it has subject matter jurisdiction to determine

whether the parties entered into a binding charter party agreement that required arbitration in London.

2. Commercial Activities Exception

Alternatively, the Court has subject matter jurisdiction over the action pursuant to § 1605(a)(2) of the FSIA, which provides, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States in any case . . . in which the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Court concludes that Guangzhou's actions, taken in China, caused a "direct effect" in the U.S. and that those of its broker, Seagos, were taken "in connection with a commercial activity" of Guangzhou in China.

In order for an act taken "in connection with a commercial activity" to provide an exception to foreign sovereign immunity, it must be a "legally significant act." See Hanil Bank v. PT. Bank Negara Indonesia, --- F.3d ---, No. 97 Civ. 7961, 1998 WL 334362, at *6 (2d Cir. June 24, 1998); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993); MCW Machinery, Inc. v. Werkzeugmaschinenhandel GmbH IN Aufbau, 960 F. Supp. 734, 741 (S.D.N.Y. 1997). "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)

(quoting Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).

Here, Guangzhou negotiated a contract with Titan, a U.S. corporation, by faxes sent to Titan and both parties' brokers in the U.S. The act of making and directing this correspondence was "an act [taken] outside the . . . United States," "in connection with a commercial activity . . . elsewhere," that caused Titan allegedly to suffer a "direct effect" -- $1 million in damages -- in the U.S. See Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Co., No. 90 Civ. 4169, 1993 WL 541236, at *8 (S.D.N.Y. 1993).

That Guangzhou was "transacting business" with Titan in the U.S. and directing negotiations in this country is enough for it to have waived immunity under § 1605(a)(2) with respect to the formation of the charter party at issue here. See Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1113 (S.D.N.Y. 1982); see also Supra Med. Corp. v. McGonigle, 955 F. Supp. 374, 382 (E.D. Pa. 1997) (finding sufficient "intentional communications with [plaintiff] giv[ing] rise to the underlying suit"). Titan's identity as a U.S. corporation further strengthens this conclusion. See International Housing Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11 (2d Cir. 1989) (fact that plaintiff is "a U.S. corporation . . . is relevant to whether [its] financial losses . . . constituted

a 'direct effect'"); Note, Effects Jurisdiction Under the FSIA and the Due Process Clause, 55 N.Y.U. L. Rev. 474, 512 (1980).[8]

Because we find a "significant, legal connection" with the U.S. giving rise to Titan's claim, which caused a direct effect in the U.S., we have subject matter under the FSIA with respect to the formation of the charter party.[9]

B. Personal Jurisdiction

For the same reasons, we conclude that the Court has personal jurisdiction over Guangzhou. See Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (citations omitted); New York Bay Co. v. State Bank of Patiala, No. 93 Civ. 6075, 1994 WL 369406, at *4 (S.D.N.Y. July 12, 1994); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 n.3 (1989) ("personal jurisdiction, like subject matter jurisdiction, exists

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[8] The cases relied on by defendant do not dictate a different result. In fact, in two of these cases, the Court of Appeals suggested that the actions of a broker could be sufficient to confer jurisdiction over a foreign sovereign defendant. See Stena Rederi AB v. Comision de Contratos, 923 F.2d 380, 389 (5th Cir. 1991); Gregorian v. Izvestia, 871 F.2d 1515, 1527-28 (9th Cir. 1989). The Court declined to find subject matter jurisdiction in these cases, however, because the relevant facts either had not been timely presented, see Gregorian, 871 F.2d at 1528, or had not been presented at all to the district court, see Stena Rederi, 923 F.2d at 389.

[9] It is not entirely relevant that Guangzhou did not initiate negotiations with Titan or solicit its business in the U.S. While a defendant that regularly does business in the U.S. will more easily be amenable to the general jurisdiction of this Court, with respect to the legal obligations arising out of the negotiation of the charter party, Guangzhou's communications, and those of its broker, are sufficient to establish subject matter jurisdiction.

only when one of the exceptions to foreign sovereign immunity . . . applies"). This is because under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). Since the Court has subject matter jurisdiction over the action and there is no dispute that defendant Guangzhou was properly served pursuant to 28 U.S.C. § 1608, the statutory requirements for personal jurisdiction are met.

The FSIA, however, "cannot create personal jurisdiction where the Constitution forbids it." Texas Trading, 647 F.2d at 308. Consequently, "[e]ach finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant." Id.; accord Seetransport, 989 F.2d at 580. Due Process requires that the foreign sovereign entity have "minimum contacts" with the United States "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted). In a case brought under the FSIA, a court may consider contacts beyond the forum state. See Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir. 1985) ("the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States"); see also Graham C. Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 130 (1983) ("it [is] reasonably clear that national -- not state --

contacts are decisive"). Moreover, "actions relevant to the [case] by an agent on [a] defendant['s] behalf" can support personal jurisdiction over a defendant. Texas Trading, 647 F.2d at 314.[10]

The Court concludes that it has personal jurisdiction over Guangzhou because Guangzhou hired Seagos, which is located in Connecticut, to broker the BIN HE, and which then directed communications at issue to Seabrokers and to Titan to negotiate the charter party. See Reed Int'l Trading Corp. v. Donau Bank AG, 866 F. Supp. 750, 755 (S.D.N.Y. 1994) (exercising personal jurisdiction over foreign sovereign defendant where defendant had appointed U.S. bank as "advising bank" for letters of credit at issue); Crimson Semiconductor, Inc. v. Electronum, 629 F. Supp. 903, 905, 908 (S.D.N.Y. 1986) (same, where defendant's representatives negotiated agreement in the U.S.). Moreover, there is evidence in the record to suggest that Guangzhou may have sent some of these communications directly to Seagos by fax from China. See Sealift Bulkers, Inc. v. Republic of Armenia, 965 F. Supp. 81, 85 (D.D.C. 1997) (personal jurisdiction where defendant used U.S. telecommunications systems to correspond with plaintiff); Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F. Supp. 688, 691 (S.D.N.Y. 1986) (same). Accordingly, Guangzhou's contacts with the

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[10] While plaintiff bears the burden of establishing the Court's personal jurisdiction over the defendant, CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986), plaintiff need only make a prima facie showing that jurisdiction exists where, as here, there has been no evidentiary hearing. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996).

United States are sufficient to establish personal jurisdiction in this action. By appointing a representative in Connecticut to negotiate the charter party at issue in this case, Guangzhou "purposefully avail[ed] itself of the privilege of conducting activities with the [United States]." Waltover, 504 U.S. at 620 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (alterations in original). Guangzhou may not avail itself of U.S. clients, by directing communications to the U.S., without being held responsible for the content of these communications in the U.S. Accord Sealift, 965 F. Supp. at 85-86. Given its conduct, Guangzhou should reasonably have expected that it could be haled into court here, were it to break off negotiations, because it directed the negotiations here, through Seagos, and because Titan, the target of its negotiations, is located here. See Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Hanil Bank, 1998 WL 334342, at *8; see also Supra Medical, 955 F. Supp. at 382-83 ("[defendant] cannot now . . . complain about a suit concerning the effect of negotiations in the jurisdiction in which some of those negotiations occurred").[11]

[11] We find unavailing respondent's argument that its contacts cannot be measured by the activities of its broker. (See Resp. Reply Mem. at 2-4.) Guangzhou maintained a relationship with Seagos whereby Seagos would "perform[] the usual broker's role of collecting hire on a charter . . . . [by] passing messages back and forth between the parties to a transaction . . . and trying to smooth out trouble spots." (Chen Reply Aff. ¶¶ 2, 5.) Thus, Seagos played an "active role as an intermediary between (Guangzhou) and (Titan)," International Housing, 893 F.2d at 12, that can be taken into account when determining jurisdiction, regardless of whether Seagos is deemed Guangzhou's "broker," "agent," or "representative." See Interocean Shipping Co. v. National Shipping & Trading Corp., 523 F.2d 527, 537 (2d Cir. 1975) ("[i]t is immaterial that [the intermediary] thought of himself as a 'broker' and not an 'agent' . . . or that [defendant] did not intend to make [him] an agent"). Guangzhou does not anywhere question Seagos's authority to broker the arrangement at issue here. Cf. Story v. National Defence Soc. Council of the Republic of Indonesia-Jakarta, No. 95 Civ. 9663, 1997 WL 633485, at *2-3 (S.D.N.Y. Oct. 14, 1997) (considering whether signatories to promissory notes had actual or apparent authority from defendant); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 85-86 (S.D.N.Y. 1991) (finding that broker did not have authority to "fix vessels without [defendant's] approval").

III. Venue

We also hold that venue is proper in this Court under 28 U.S.C. § 1391(b). Under this section, "a civil action wherein jurisdiction is not founded solely on the diversity of citizenship . . . may, except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Despite its limiting language, courts have routinely held that § 1391(b) allows venue in more than one district. See Bates v. C & S Adjusters, 980 F.2d 865, 867 (2d Cir. 1992) ("the admonition against recognizing multiple venues has been disapproved"); TI, Inc. v. Quality Prods., Inc., 907 F. Supp. 752, 757 (S.D.N.Y. 1995) ("Venue is proper in each district that is the situs of a substantial part of the events or omissions giving rise to the claim.").

Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper. D'Anton Jos. S.L. v. Doll Factory, Inc., 937 F. Supp. 320, 321 (S.D.N.Y. 1996); French Transit, Ltd. v. Modern Coupon Systs., Inc., 858 F. Supp. 22, 24 (S.D.N.Y. 1994). Titan therefore bears the burden of establishing that a substantial part of the events giving rise to the lawsuit occurred in the Southern District of New York.

Titan argues that venue is proper here because the writings at issue were negotiated by means of facsimiles and telephone calls between Pelham, New York and Stamford, Connecticut. We agree. These faxes reflect "a substantial part of the events" giving rise to the present claim because the action alleges the creation of a binding charter party through these writings. See Saody Tech., Inc. v. Avant, Inc., 862 F. Supp. 1152, 1157 (S.D.N.Y. 1994) (venue requirements "may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action"); see also Constitution Reins. Corp. v. Stonewall Ins. Co., 872 F. Supp. 1247, 1250 (S.D.N.Y. 1995) (venue proper in breach of contract action where contracts were negotiated through telephone calls and faxes between New York and Texas).

IV. Summary Determination of the Making of a Charter Party

Now that the Court has determined that jurisdiction and venue are proper, we must determine whether the parties have agreed to arbitrate the formation of the charter party. We hold that they did not. However, the parties did enter into a binding charter party, by which they agreed to arbitrate disputes in London, upon the election of either party. Because Titan has petitioned this Court to order arbitration, we order such arbitration to determine

the parties' rights under the charter party, pursuant to Shell Time 4.

A. Ad Hoc Agreement to Arbitrate Existence of Charter Party

Guangzhou argues that the parties agreed to arbitrate the very existence of the charter party and, accordingly, that Titan's motion must be dismissed. We disagree. Given the evidence, we conclude that the parties did not enter into the "ad hoc" arbitration agreement advocated by Guangzhou.[11]

Because "arbitral jurisdiction is rooted in the consent of the parties," Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir. 1991), the existence of an agreement to arbitrate is a threshold question for a court to resolve, absent a clear and unmistakable delegation of that authority to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986); National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 135 (2d Cir. 1996); see also Maye v. Smith Barney Inc., 897 F. Supp. 100, 106 n. 3 (S.D.N.Y. 1995) ("the question of whether the parties ever made an agreement to arbitrate is . . . to be decided by the courts"). While due regard must be

[11] While Section 4 of the FAA directs the court to conduct an evidentiary hearing where the existence of an arbitration agreement is in dispute, see McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980), no such hearing is required here because the parties agree to the material facts at issue. See In re Stinnes Interoil, Inc., No. 87 Civ. 1371, 1989 WL 11489, at *4 (S.D.N.Y. Feb. 8, 1989).

given to federal policy favoring arbitration, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), where the parties contest the formation of an agreement, "any silence or ambiguity about whether such a question is arbitrable reverses the usual presumption that issues should be resolved in [arbitration's] favor." Ahran Landau Real Estate v. Benova, 123 F.3d 69, 72 (2d Cir. 1997) (citing First Options, 514 U.S. at 943). The question of the formation of the charter party, like that of any other contract, is a question of federal common law. See First Options, 514 U.S. at 943; Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987).

From the evidence, it is clear that the parties did begin negotiating an "ad hoc" arbitration agreement that contained terms different than the original charter party. According to the parties, on November 1 Seagos proposed arbitration to "resolve the dispute" as to whether the parties had made a binding charter. That same day, Titan proposed arbitration before a panel of three arbitrators in New York. However, the evidence also suggests that on November 3, Guangzhou cut off negotiations on the ad hoc agreement through Seagos, which, in response to Titan, stated that the "Shell Time 4" "is very clear on the [form of arbitration] which has been agreed by U.S. Titan. There is no need for a separate arbitration agreement." We find this language controlling; with it, Seagos, on behalf of Guangzhou, definitively ended negotiations on the "ad hoc agreement."[11] That it was Guangzhou's intent to end these negotiations is clear from its remaining correspondence, which called for London arbitration "pursuant to the Shell Time 4 clause 41." Cf. Northern Tankers Cyprus Ltd. v. Lesmar Corp., 781 F. Supp. 289, 290-91 (S.D.N.Y. 1992) ("agreement to arbitrate, separate and distinct from that contained in the charter party," was formed where plaintiff demanded arbitration "for damages caused by [defendant's] non-performance of the charter," and defendant accepted that demand). Because the parties' negotiations with respect to the "ad hoc" agreement did not come to fruition, we cannot order arbitration on the issue of whether the charter party was in fact formed.

B. The Charter Party

We do, however, order arbitration with respect to Guangzhou's alleged breach of the charter party, because we conclude that a

[11] We are unpersuaded by Guangzhou's suggestion that it referred to the "Shell Time 4" and "Canaro pro forma" because the parties were familiar with the terms of such agreements, and not because the parties were in fact bound by those agreements. (See Chen Aff. ¶ 18; Resp. Reply Mem. at 15-16.) As defendant concedes, a party is bound by the natural meaning of its words. From this correspondence, Titan could only conclude that Guangzhou was referring to the arbitration clause in the charter party, which had been duly negotiated by Seagos and Seabrokers. Thus, we do not agree that by referring to the "agreement," Titan meant the "ad hoc" agreement at issue here. (See Resp. Mem. at 16.) If anything, confusion as to which agreement was being referenced during negotiations cuts in Titan's favor, that no ad hoc agreement to arbitrate was formed. Where parties minds do not meet on the meaning of an essential term, no enforceable contract is formed. See, e.g., Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) (the famous "Peerless" case).

charter party providing for arbitration was formed. Whether a charter party has been formed is a question of fact. Sun Int'l Ltd. v. Toreador Petroleum Co., [illegible]. The Court, however, may determine whether a charter party exists, if the underlying material facts are not in dispute. See Great Circle Lines, Ltd. v. Matheson & Co., 681 F.2d 121, 124 (2d Cir. 1982). As with any other contract, a charter party is formed when there is a "meeting of the minds" on its essential terms. Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673, 676 (2d Cir. 1972); A/S Custodia v. Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir. 1974). It is not necessary that the proposed charter be signed by either party, Id., and even an oral charter party is enforceable by a court of law, Great Circle Lines, 681 F.2d at 124 ("binding charter engagements have historically been assumed on nothing more formal than a nod of a head").

In any case, it is undeniable that charter parties can be and more often than not are formed by way of facsimile or telex. See Id.; In re J. Lauritzen A/S, No. 84 Civ. 8704, 1986 WL 13441, at *2 (S.D.N.Y. June 5, 1986). This is because "[t]he shipping industry is a fast moving . . . business, where dealings between the parties . . . are usually conducted . . . under severe time restraints." Great Circle Lines, 681 F.2d at 125. To arrange expeditiously what would otherwise be complicated and time consuming, "brokers [customarily] receive and send telex [or fax] traffic all over the world." Id. On the facts before us, the existence of a binding charter party is clear. The parties negotiated a charter through

their respective brokers, which was confirmed by facsimile on September 26, 1995 by Seagos, which "recap[ped] Owners and Charterers' agreement." A "recap" communication, or "fixture," is recognized throughout the shipping industry as an agreement to a charter party's essential terms. See Great Circle Lines, 681 F.2d at 125 & n.2; Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1345 (S.D.N.Y. 1988); see also P.E.P. Shipping (Scandinavia) ApS. v. Horanco Shipping Corp., No. 96 Civ. 3136, 1997 WL 358318, at *2 n.1 (E.D. La. June 24, 1997) ("[a] fixture presupposes a final contract with main terms set and final details to be resolved") (citing Great Circle Lines, 681 F.2d at 125 n.2); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 81 n.3 (S.D.N.Y. 1991)("[a] 'recap telex' recapitulates the terms of [a] fixture that have been agreed upon"). Thus, the "recap" fax represented an agreement as to the charter party's main terms, which

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We are equally unpersuaded by respondent's argument that John Baby's affidavit regarding industry custom should be ignored. "It is well established that testimony concerning trade practices and customs is admissible to enable the Court 'to evaluate the conduct of the parties.'" Oriental Commercial & Shipping Co. v. Rosseel, N.V., 709 F. Supp. 1085, 1015 (S.D.N.Y. 1988) (quoting Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505, 509 (2d Cir. 1977)). Mr. Baby is an experienced ship broker and one of Seagos's principals. He has personal knowledge not only of the negotiation of the charter party at issue, but the shipping industry as a whole. Moreover, "[c]ertain long-standing customs of the shipping industry [such as the procedure for brokering charter parties] are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract." Great Circle Lines, 681 F.2d at 125. Thus, had Titan not submitted a statement as to industry practice in this case, we would nevertheless consider it here. See Id.; see also Sanpun Corp. v. Khorastan Mashine Kar Co., 926 F. Supp. 436, 439 (S.D.N.Y. 1996) ("established practices and customs of the shipping industry inform the court's analysis" of the making of a charter party).

were in accordance with the Shell Time 4, a standard form charter. Accordingly, the parties had entered into a binding agreement as of September 26, 1995, which incorporated each of the Shell Time 4's terms. Cf. Sanpun, 926 F. Supp. at 441 ("[t]he legal effect of adopting [form charter] is inescapable"); Peytona Shipping Co. v. Compagnie Marocaine de Navigation, No. 89 Civ. 1028, 1990 WL 104029, at *2 (S.D.N.Y. July 19, 1990) (fixture incorporating form charter is binding where it "embodi[ed]" form).

Moreover, we do not agree with defendant that the charter did not come into effect because of the alleged failure of one of its "subjects," the approval of the charter by Titan's board of directors upon receiving the final inspection report of the BIN HE. First, this argument directly contradicts the weight of the evidence, which suggests that the Board did approve the BIN HE within the agreed time period. Second, even had this "subject" failed, it did not vitiate the charter that had already been formed. It is well established that a "subject detail" does not create a condition subsequent to a charter party. See Great Circle Lines, 681 F.2d at 126; In re Pollux Marine Agencies, Inc., 455 F. Supp. 211, 223 (S.D.N.Y. 1978). In our opinion, there existed a binding charter party between Titan and Guangzhou, in the form of "Shell Time 4," beginning September 26, 1995. Cf. E.A.S.T., Inc. of Stamford v. M/V Alaia, 673 F. Supp. 796, 800 (E.D. La. 1987) (charter not conditioned on plaintiff's acceptance of vessel because

charter formed upon agreement of main terms), aff'd, 876 F.2d 1168 (5th Cir. 1989).[11]

Because there exists a charter between the parties, Titan must arbitrate its dispute in London, according to the Shell Time 4. Cf. Interocean, 523 F.2d at 531 (form charter's arbitration clause bound parties where fixture telex adopted "Mobiltime form charter"); Keystone, 1990 WL 104029, at *4 (compelling arbitration where fixture provided that voyage be governed "per terms and conditions of the North American Grain charter party (pro forma 1982)," which contained arbitration clause); In re Polley, 455 F. Supp. at 213-14 (same, where defendant confirmed "having fixed the foll . . . subject details of Eldece Time," and aforesaid form charter had arbitration clause). The parties agreed to this form charter, as well as to the inclusion of an arbitration clause, until well after this dispute arose. As both parties were familiar to its form, it controls. See P.E.P. Shipping, 1997 WL 358118, at *3.

Moreover, even in the absence of a binding charter party, we would order arbitration in London under the Shell Time 4, because the parties agreed to arbitration in that forum by referencing that form charter while negotiating their own charter's terms. See Sansun, 926 F. Supp. at 441 ("A reference to a familiar charter party form which provides for arbitration . . . binds the parties to arbitrate any disputes [in the forum provided] . . . even though the formal charter party is not executed until later [or not at all]"). Respondent "was placed on notice, one way or the other," that disputes as to the charter party -- including formation -- could be arbitrated in London. Id. Thus, by ordering arbitration in London, the Court gives Guangzhou the benefit of its bargain.

[11] Nor do we agree that Titan rejected the BIN HE by its fax of October 19, 1995. This fax states only that it had "concerns" regarding the condition of the BIN HE that Guangzhou had already been working on. In any event, because we have determined that the parties entered into a binding charter party on September 26, 1995, any communication by Titan in October would have no effect on its terms.

CONCLUSION

For the foregoing reasons, we grant petitioner's motion for a summary determination as to the formation of a charter party; deny respondent's cross motion to dismiss for lack of jurisdiction and improper venue; deny respondent's application for attorney's fees; and grant respondent's motion to stay these proceedings to the extent consistent with this Opinion and Order. The parties are directed to arbitrate in London any other disputes arising under the time charter pursuant to the provisions of the Shell Time 4.

SO ORDERED.

Dated: White Plains, New York
August 5, 1998

William C. Conner
Senior United States District Judge

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MEALEY'S International Arbitration Report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. TITAN, INC.,

Petitioner,

- against -

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

96 Civ. 0936 (MCC)

OPINION AND ORDER

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Conner, Senior D.J.:

This case was recently before the Court on the motion of petitioner U.S. Titan, Inc. ("Titan") for a summary determination of the making of a binding charter party agreement between Titan and respondent Guangzhou Zhen Hua Shipping Co., Ltd. ("Guangzhou"), and to compel arbitration on Titan's claim for breach of contract, pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1. Guangzhou cross-moved to dismiss the action for lack of jurisdiction and improper venue under Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(3), or, in the alternative, to stay the proceedings pursuant to 9 U.S.C. § 3 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. Respondent Guangzhou now moves pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Local Civil Rule 6.3 "to alter and amend" this Court's Opinion and Order dated August 5, 1998, --- F. Supp.2d ---, 1998 WL 458175 (the "Opinion"),[1] familiarity with which is assumed.

BACKGROUND

In the Opinion, the Court held that the parties had entered into a binding charter party agreement, by which petitioner time-chartered the BIN HE, respondent's ocean-going Chinese-flag tanker, and which required arbitration of their disputes in London; granted petitioner's motion to compel arbitration in London; and denied respondent's cross-motion to dismiss or stay the action.[2] Our Opinion was based, in part, on the Court's conclusion that a binding charter party had been formed on September 26, 1995 when Seabrokers, pursuant to instructions from Seagos and/or Guangzhou,[3] sent a facsimile "recapping" the parties' agreement, despite petitioner's alleged failure to satisfy one of the three "'subjects,' or conditions" to the charter, namely that Titan's board of directors approve the charter within three (3) days of receiving an inspection report on the BIN HE.[4] Opinion at 3, 26.

[1] The Opinion was entered on August 7, 1998.

[2] The Court stayed the action to the extent that it ordered arbitration of Guangzhou's alleged breach of the charter party. It did not, however, stay the action with respect to the summary determination of the charter party.

[3] As discussed in the Opinion, Seabrokers brokered the arrangements to charter the BIN HE on behalf of petitioner Titan, while Seagos acted as Guangzhou's broker in the transaction. See Opinion at 2-3, 18 & n.11.

[4] The Court concluded that "the charter contained three 'subjects,' or conditions: (1) Titan's satisfactory inspection of the BIN HE; (2) the release of the vessel from its previous charterer, 'Camaro'; and (3) the approval of the charter party by Titan's board of directors within three days of the board's receipt of the . . . inspection report." Opinion at 3. The Court based its conclusion on the "recap" facsimile, or "fixture," which provided, among other things, the following:

> CP-
> SHELLTIME 4 TC, WITH MODS TO PRESENT TERMS AS AGREED.
>
> SUBJECTS-
> CP DET'LS, SATISFACTORY INSPECTION OF THE VSL AT DD, RELEASE BY OWNERS FROM CAMARO TC, THENCE US TITAN BOD APPROVAL WITHIN 3 DAYS FOLLOWING RECEIPT OF THEIR DENHOLM INSPECTION REPORT.

Pet'r Exh. 1.

On August 18, 1998, respondent Guangzhou brought this motion to "alter and amend" the Opinion, claiming that it did "not fully identify the issues left open for consideration by the arbitrators" in London. Resp. Mem. of Law in Supp. of Mot. to Alter or Amend at 2. Specifically, respondent claimed that "it (would) not be clear to [the arbitrators] whether or not the Court's ruling has the effect of foreclosing them from deciding . . . that . . . [Guangzhou is] relieve[d] of its obligations under the charter." Id. at 3. Petitioner, on the other hand, urges the view that the Court's Opinion unambiguously and correctly limited the scope of the arbitrators' authority. The pivotal issue is whether the arbitrators may excuse the parties from their obligations under the charter in the event that one of the "'subjects,' or conditions" has not been satisfied.

DISCUSSION

I. Legal Standards

A motion "to alter or amend" a judgment under Fed. R. Civ. P. 59(e), or a motion for reconsideration or reargument under Local Civil Rule 6.3, provides the Court with an opportunity to correct manifest errors of law or fact, hear newly discovered evidence, consider a change in the applicable law or prevent manifest injustice. Marino v. United States, No. 97 Civ. 1884, 1998 WL 512958, at *2 (S.D.N.Y. Aug. 18, 1998) (slip copy); Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (same.); see also L. Civ. R. 6.3 (movant "shall . . . serve[] . . . a memorandum setting forth the matters or controlling decisions which counsel believes the court has overlooked"); cf. Ronnie & Co. Fashions, Inc. v. Bankers Trust Co., 170 F.R.D. 111, 113 (S.D.N.Y. 1997) (motion to reargue may be granted only where "the court overlooked the controlling decisions or factual matters that were placed before the court") (citations omitted); Anglo Am. Ins. Group, P.L.C. v. CalFed Inc., 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (moving party "must present matters or controlling decisions the court overlooked that might materially have influenced its earlier decision") (quoting Morser v. AT&T Info. Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989)); Polit v. Commissioner of the Dep't of Transp. of the City of New York, 687 F. Supp. 888, 890 (S.D.N.Y.) (same, with respect to motion to alter or amend under Rule 59(e)), aff'd, 858 F.2d 898 (2d Cir. 1988). The parties, however, may not address facts, issues, or arguments not previously presented to the court, Walsh v. McGee, 918 F. Supp. 107, 110 (S.D.N.Y. 1996), nor "reargue those issues already considered." In re Houbigant, Inc., 914 F. Supp. 997, 1001 (S.D.N.Y. 1996). Whether to grant or deny a motion for reconsideration or reargument is in the "sound discretion of a district court judge and will not be overturned on appeal absent an abuse of discretion." McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983) (Rule 59(e)); accord Boyle v. Stephens, Inc., No. 97 Civ. 1351, 1998 WL 80175, at *1 (S.D.N.Y. Feb. 25, 1998) (Local Rule 6.3) (citations omitted).

Respondent brings its motion to "alter and amend the Court's August 5, 1998 Opinion and Order" pursuant to Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3. Technically, a motion made pursuant to Local Rule 6.3 is a motion for "reconsideration or reargument," not a motion to "alter or amend." However, the legal standards governing these motions are essentially the same, as are the standards governing former Local Rule 3(j). See L. Civ. R. 6.3; First Financial Ins. Co. v. Allstate Interior Demolition Corp., No. 96 Civ. 8243, 1998 WL 567930, at *3 (S.D.N.Y. Sept. 3, 1998) (slip copy); Jones v. Trump, 971 F. Supp. 783, 785 n.2 (S.D.N.Y. 1997); Parkas v. Ellis, 783 F. Supp. 830, 832-33 & n.1 (S.D.N.Y.) (WCC), aff'd, 979 F.2d 845 (2d Cir. 1992). The motions are different in the respect that a motion made under Rule 59(e) is a motion to "alter or amend a judgment," which is "a decree and any order from which an appeal lies," Fed. R. Civ. P. 54(a), whereas a motion made pursuant to Local Rule 6.3 may seek revision of a ruling that is not yet final.

In this case, the Court has not yet entered judgment. Thus, we cannot consider respondent's motion as a motion to alter or amend a judgment under Rule 59(e). See RP Village Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1200-01 (2d Cir. 1987) ("a [final] order disposing of a motion is not effective until set forth on a separate document"; final "order that is part of a district court opinion . . . does not satisfy" separate-document requirement); cf. McCowan v. Sears, Roebuck and Co., 908 F.2d 1099, 1103 (2d Cir. 1990) (appealable interlocutory order "is no less a

judgment because no 'separate document' was filed pursuant to Fed. R. Civ. P. 58; Court, however, "assume[d] without deciding, that the requirements for an effective judgment set forth in Rule 58 must generally be satisfied before Court's jurisdiction can be invoked"). Accordingly, we consider respondent's motion under Rule 6.3. Cf. Virgin Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (district court properly considered defendant's "resubmitted" motion to dismiss as a motion for reconsideration under former Local Rule 3(j)).[5]

II. Reconsideration Under Local Rule 6.3

What respondent actually seeks is "clarification" of the Opinion, claiming that it will be unclear to the arbitrators whether they may excuse the parties' performance under the charter if respondent can prove that the "subjects" or conditions were not satisfied. We grant respondent's motion to the extent of specifying that the parties must arbitrate in London all disputes arising under the charter party. Thus, the arbitrators may determine whether the actions of either party, subsequent to the formation of the charter party, have vitiated the agreement. Any parts of our prior Opinion which suggested otherwise are hereby withdrawn.

---

[5] The Court notes that Local Rule 6.3 notwithstanding, it may revise an interlocutory order "at any time before the entry of [a final judgment]" under Fed. R. Civ. P. 54(b) where "'justice so demands.'" DC Comics, Inc. v. Powers, 482 F. Supp. 494, 496 (S.D.N.Y. 1979).

Section 4 of the FAA provides, "[i]f the making of [an] arbitration agreement or the failure, neglect, or refusal to perform the same [is at] issue the court shall proceed summarily to the trial thereof," and section 3, "the court . . ., upon being satisfied that [an] issue involved in [a] suit or proceeding is referable to arbitration under . . . an agreement, shall on application of one of the parties stay the trial of the terms of the agreement . . . ." 9 U.S.C. §§ 3, 4. Thus, under the FAA, the court may determine (1) whether the parties entered into an agreement to arbitrate; (2) whether one party to the agreement has failed, neglected or refused to arbitrate. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996). The court must then stay the remainder of the proceedings pending arbitration if some of the parties' claims are subject to arbitration. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); McMahan Sec. Co., L.P. v. Forum Capital Mkt., 35 F.3d 82, 86 (2d Cir. 1994); Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (court should hear only "issues relating to the making and performance of the agreement to arbitrate"). There is a strong public policy favoring arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

Here, the charter party, as reflected by the fixture recap, strongly suggests that the issue of whether the "subjects" to the charter party were satisfied is referable to arbitration. The fixture states that the "CP," or charter party, is the "Shell Time 4 TC, with subs to present terms as agreed," including "CP details, satisfactory inspection of the VSL at DD, release by owners from Caserta DC [and] . . . Titan BOD approval within 3 days following receipt of Denholm inspection report." (Pet'r Exh. 1.) The fixture recap thus by its terms incorporated the Shell Time 4 and the subjects at issue here, and accordingly, both became part of the agreement of September 26, 1995. See Opinion at 4 ("The Shell Time 4 Charter contain[s] an arbitration clause, providing for arbitration in London, at the election of either party."); Reliance Nat'l Ins. Co. v. Seismic Risk Ins. Services, Inc., 962 F. Supp. 385, 390 (S.D.N.Y. 1997) (where agreement "[o]n its face" incorporated second agreement containing arbitration clause, disputes under first agreement were covered by such clause).

The arbitration clause at issue, clause 41 of the Shell Time 4, is broad; it covers "[a]ny dispute arising under this charter." (Resp. Exh. 5 to Li Aff. ¶ 41 (b), (c)(i)(a)(1)); cf. Hamilton Life Ins. Co. of New York v. Republic Nat'l Life Ins. Co., 291 F. Supp. 225, 227 (S.D.N.Y. 1968) ("Indeed, 'it would be hard to imagine an arbitration clause having greater scope than the one before us'"), aff'd, 408 F.2d 606 (2d Cir. 1969) (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 412 (2d Cir. 1959), cert. dismissed, 364 U.S. 801 (1960)). Where an

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arbitration clause is broad enough to encompass the disputed question, the court has no choice but to refer the controversy to arbitration in the agreed manner. See PaineWebber, 81 F.3d at 1200; McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 831 (2d Cir. 1988); National R.R. Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756, 762 (D.C. Cir. 1988); see also Rochdale Village Inc. v. Public Serv. Employees Union Local No. 80, 605 F.2d 1290, 1295 (2d Cir. 1979) ("[i]f a court finds that the parties have agreed to submit to arbitration . . . 'any and all disputes,' . . . the court will have exhausted its function, except to order . . . arbitration"); Consolidated Rail Corp. v. Metropolitan Transp. Auth., No. 95 Civ. 2142, 1996 WL 137587, at *10 (S.D.N.Y. March 22, 1996) ("[i]f the arbitration clause at issue is broad (e.g., providing for arbitration of all disputes 'arising under' the contract), then courts must presume that it was the parties' intent to arbitrate duration and direct that issue to the arbitrators"). Accordingly, a factual dispute as to whether one of the stated conditions has been satisfied, and the effect of such failure, are issues for the arbitrators, not the Court. Cf. Reliance Nat'l Ins., 962 F. Supp. at 389 (clause, "any dispute arising out of this Agreement," is "'elastic enough to encompass'" dispute arising from related agreement that "[w]as contingent upon" that agreement).

Indeed, it has been repeatedly held that even a dispute regarding the satisfaction of a condition precedent to a contract will be referred to arbitration if it may reasonably be said to

come within the scope of an arbitration clause. See, e.g., Capitol Vial, Inc. v. Meher Scientific, 966 F. Supp. 1108, 1111 (M.D. Ala. 1997) ("dispute over a condition precedent to a contract containing an arbitration clause that is broadly enough worded to encompass such a dispute should be arbitrated"); Town Cove Jersey City Urban Renewal, Inc. v. Procida Constr. Corp., No. 96 Civ. 2551, 1996 WL 337293, at *1 (S.D.N.Y. June 19, 1996) ("[w]hether . . . [a] condition precedent has been satisfied is a matter for the arbitrator to decide") (citing Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1511 (S.D.N.Y. 1985)); Hamilton Life Ins., 291 F. Supp. at 227 (broad arbitration clause was severable and therefore covered respondent's defenses, including "failure to comply with conditions precedent").

Conclusion

Respondent's motion is granted to the extent indicated in this Opinion. To any extent that our Opinion and Order of August 5, 1998 is inconsistent with this Opinion and Order, it is hereby withdrawn. The Clerk of the Court is directed to enter judgment in this case pursuant to Fed. R. Civ. P. 54 and 58, (1) denying respondent Guangzhou's motions to dismiss for lack of subject matter jurisdiction and (2) staying these proceedings pending arbitration. The parties are directed to arbitrate their disputes in London in accordance with the terms of the Shell Time 4 form, including whether any of the "subjects" or conditions to the September 16, 1995 charter party were unsatisfied and whether the parties were thereby excused from performance thereunder.

SO ORDERED.

Dated: White Plains, New York
September 29, 1998

William H. Pauley
Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

U.S. TITAN, INC.,

Petitioner,

- against -

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

- X

COPY

96 Civ. 0936 (WCC)

AMENDED OPINION AND ORDER

CONNER, Sr. D.J.:

The Opinion and Order, dated August 5, 1998, is hereby amended nunc pro tunc as follows:

→ Page 2, middle of first line, which reads "plaintiff" should read -- petitioner --

→ Page 3, second line from the bottom of the page (excluding the footnote), which reads "Titan" should read -- Seagos --

→ Page 3, footnote 4, first sentence, which reads "Defendant," should read -- Respondent, --

→ Page 4, second line from the bottom of the page, which reads "Seagos" should read -- Seabrokers --

→ Page 5, fifth line from the bottom of the page (excluding the footnote), which reads "Seabrokers" should read -- Seagos --

→ Page 5, end of second line from the bottom of the page (excluding the footnote), which reads "at all." should read -- at al[l]. --

→ Page 5, footnote 5, first sentence, which reads "Seagos" should read -- Seabrokers --

→ Page 6, sixth line from the top of the page, which reads "arbitration in accordance with Clause 41(c)." should read -- arbitration . . . in accordance with Clause 41(c) of the Shell Time 4 Canaro. --

→ Page 6, middle of seventh line, which reads "'both parties'" should read -- "both sides" --

→ Page 16, footnote 7, middle of fourth line, which reads "'15 n. 23" should read -- "15 n.23 --

→ Page 17, middle of sixth line from the bottom of the page (excluding the footnote), which reads "Seagos" should read -- Seabrokers --

→ Page 22, end of the fifth line from the bottom of the page, which reads "the ad hoc" should read -- the "ad hoc" --

→ Page 23, second line, which reads "'ad hoc agreement.'" should read -- "ad hoc" agreement. --

→ Page 23, footnote 13, end of fifth line from the bottom of the page, which reads "no ad hoc agreement" should read -- no "ad hoc" agreement --

→ Page 25, second line, which reads "Seagos" should read -- Seabrokers --

→ Page 25, footnote 14, eighth line, which reads "and one of Seagos's principals." should read -- and was one of Seabrokers' principals. --

SO ORDERED.

Dated: White Plains, New York
September 25, 1998

William C. Conner
Sr. United States District Judge

Freedley (Marks Cohen)

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

U.S. TITAN, INC.,

96 Civ. 0936 (WCC)

Petitioner,

- against -

OPINION AND ORDER

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

- X

5 August 1998
US

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Conner, Senior D.J.:

This case is currently before the Court on petitioner U.S. Titan, Inc.'s ("Titan") motion for a summary determination of the making of a binding charter party agreement between Titan and respondent Guangzhou Zhen Hua Shipping Co., Ltd. ("Guangzhou"), and to compel arbitration on Titan's claim for breach of contract, pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 4. Guangzhou has cross-moved to dismiss the action for lack of jurisdiction and improper venue under Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(3), or alternatively, to stay the proceedings pursuant to 9 U.S.C. § 3 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. (the "Convention").

For the reasons discussed below, the Court finds that the parties have entered into a binding charter party agreement that requires arbitration of their dispute; grants petitioner's motion to compel arbitration; and denies respondent's cross-motion to dismiss or stay the action.[1]

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[1] The Court will "stay" the action to the extent that it orders arbitration in London concerning Guangzhou's alleged breach of the charter party. See 9 U.S.C. § 3. It does not, however, stay the action with respect to the summary determination of a charter party.

BACKGROUND

The facts, according to plaintiff, are as follows. Titan is a corporation organized under the laws of Texas, with its principal place of business in Pelham, New York. Guangzhou is a state-owned corporation organized under the law of the People's Republic of China, with its principal place of business in Canton, China. At all pertinent times, Guangzhou owned and operated the M/T BIN HE (the "BIN HE"), an ocean-going Chinese-flag tanker.[2]

On or about August 22, 1995, the parties began negotiating a time charter[3] of the BIN HE, through their respective brokers -- Seagos Company, Inc. ("Seagos") of Stamford, Connecticut, on behalf of Guangzhou, and Seabrokers, Inc. ("Seabrokers"), also of

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[2] Guangzhou claims that it did not own the BIN HE and merely chartered it from Zhu Hai Shipping Enterprise Ltd., its true owner. (Chen Reply Aff. ¶ 9.) Whether Guangzhou was BIN HE's owner, however, has little if anything to do with its obligations under the alleged charter party. To the extent that ownership of the BIN HE may be relevant, it can be determined by the arbitrator, who, as we conclude, must decide all disputes arising under the charter party. See Dover S.S. Co. v. Summit Indus. Corp., 148 F. Supp. 206, 209 (S.D.N.Y. 1957); see also Tarstar Shipping Co. v. Century Shipline, Ltd., 451 F. Supp. 317, 321-22 (S.D.N.Y. 1978) (charter existed between parties that negotiated agreement, even though "owner's name . . . was not mentioned when the vessel was fixed and confirmed by telex"), aff'd, 597 F.2d 837 (2d Cir. 1979).

[3] A charter party is "a contract by which an entire ship or some principal part thereof is let to a merchant . . . ." Jhirad & Sann, 1 Benedict on Admiralty § 225 (7th ed. 1981). In a charter party, the terms and conditions of the lease of a vessel by an owner to a charterer are set out. Gilmore & Black, The Law of Admiralty § 4-1 (2d ed. 1975). With a time charter, "the owner[] . . . continues to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period." Id.

Stamford, on behalf of Titan. The charter contained three "subjects," or conditions: (1) Titan's satisfactory inspection of the BIN HE; (2) the release of the vessel from its previous charterer, "Camaro"; and (3) the approval of the charter party by Titan's board of directors within three days of the board's receipt of the final inspection report.[4] (See Pet'r Exh. 29.) On September 22, 1995, Guangzhou offered to charter the BIN HE to Titan for 12 months at $15,250 per day, with an option for an additional twelve months at $15,750 per day. During the next few days, the parties negotiated different periods and rates, as well as several other terms. Ultimately, on September 26, Guangzhou responded with a "firm counter offer" as follows:

> ". . . Accept/Except:
>
> Period - 6 mos. plus/minus 30 days at CHOPT
>
> CHOPT next 12 mos. . . .
>
> Rates - $15,250 first period
>
> Optional $15,750 second period."

(Pet'r Exh. 18.)

That same day, Titan informed Seabrokers that "Charterers are in agreement and accept Owner[']s last offer." (Pet'r Exh. 19.) Seabrokers then sent Titan a fixture telex "recap[ping] Owners and Charterers' agreement." (Pet'r Exh. 1.) The agreement was based

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[4] Defendant, on the other hand, takes the view that the board was to approve the proposed charter party within three days of the actual inspection of the BIN HE.

on the "Shelltime 4 Time Charter," a standard time charter, and contained the above subjects. (Id.) The Shell Time 4 Charter contained an arbitration clause, providing for arbitration in London, at the election of either party. (See Pet'r Exh. 4.)

Thereafter, the BIN HE was dry-docked in Hong Kong and inspected by Denholm Ship Management (Overseas) Ltd. ("Denholm"). On October 19, Titan received Denholm's initial report. (Warfield Aff. ¶ 16.) On October 23, Titan informed Seabrokers that it had concerns about the seaworthiness of the BIN HE, but that it was awaiting Denholm's final inspection report. (Id. ¶ 18 & Exh. 30.) Then, on October 25, Titan informed Seabrokers that it had received the full Denholm report and that it had "lift[ed its] inspection subject." (Pet'r Exh. 34.) It also stated that Titan "now look[ed] to [the] Owners to lift their Camaro withdrawal subject . . . [and that] the Titan board will make its decision within . . . three working days after the lifting of this subject per [the] 9/26 agreement." (Id.) On October 26, 1995, Seabrokers informed Titan that the BIN HE had been withdrawn from Camaro. (See Pet'r Exh. 20.) Titan thereupon replied that it would respond with board approval "by close of New York [business] Monday Oct. 30." On October 27, 1995, Titan notified Seabrokers that its board had approved the charter. (Pet'r Exh. 21.)

Guangzhou presents a slightly different version of events. According to Guangzhou, Titan rejected the BIN HE by its October 23 telex, which informed Seagos that the vessels' machinery spaces were "in terrible condition," and that the vessel was not "up to an

acceptable trading standard." (Chen Aff. ¶ 10 & Exh. 5.) Seagos informed Seabrokers that in view of Titan's rejection of the vessel, the conditions to which the charter had been subject had failed to occur. (Id. ¶ 10 & Exh. 6.)

Additionally, Guangzhou maintains that on October 24, Seabrokers confirmed that Titan had rejected the vessel, and that the subjects had therefore failed. (Id. ¶ 11 & Exh. 7.) Moreover, according to Guangzhou, on October 25, "Titan reversed its position and attempted to assert that the vessel had not failed the inspection." Guangzhou claims that it then terminated all negotiations with Titan. (Id. ¶ 13 & Exh. 9.)

On November 1, in a facsimile to Titan, Seagos suggested arbitration to resolve the dispute. (See id. ¶¶ 16-17 & Exh. 12.) Later that day, Titan proposed that the parties submit the matter "to three arbitrators in New York who would have 45 days . . . to issue a ruling on the threshold issue of whether the parties entered into a binding agreement on September 26 subject to conditions that were subsequently fulfilled." (Pet'r Exh. 39.) On November 2, Seabrokers responded that the "Shell Time 4 Camaro proforma is very clear on the simplified arbitration which has been agreed by U.S. Titan and is agreeable to Southern Shipping as well. There is no need for a separate arbitration agreement at all." (Pet'r Exh. 40.)[5] Titan then sent "formal written notice of

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[5] Titan claims that Seagos did not understand the reference to "Southern Shipping," and to have believed that the reference to "Shell Time 4 Camaro" referred to the charter between Guangzhou and Camaro, which, in part, was to be assumed by Titan. Guangzhou

Arbitration" to Seagos, advising it that arbitration was to follow "the Shell Time 4 clause 41(c) of Camaro/Titan Charter Party." (Pet'r Exh. 41.) On November 7, Titan sent a follow-up fax to Seagos, requesting confirmation that arbitration would be held under clause 41(c) of the charter party. (Pet'r Exh. 42.) Seagos replied, "London arbitration in accordance with Clause 41(c)." (Pet'r Exh. 43.) On November 9, Titan once again faxed Seagos, asking for confirmation that "arbitration proceedings in London are to [be] . . . in accordance with Clause 41(c) of the Shell Time 4 Guangzhou/Titan Proforma, which is based on the 'Camaro' Charter." (Pet'r Exh. 44.) Seagos replied that "both parties" had agreed to London arbitration "to ascertain whether there is a charter between Guangzhou . . . and . . . Titan." (Pet'r Exh. 45.) Titan then sent another fax to Seagos, stating that "arbitration in London is acceptable per the agreement." (Pet'r Exh. 46.)

Following these exchanges, the parties attempted to select a London arbitrator. In one such communication, sent directly from Guangzhou to Seabrokers, Guangzhou reiterated that it had agreed to submit the matter to arbitration "pursuant to the Shell Time 4 Clause 41." (Resp. Exh. 18.) No agreement was reached as to the identity of the arbitrators.

On February 7, 1996, Titan again wrote to Seagos. Among other things, the fax stated that Titan would "not agree to arbitration

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explains that the reference to Southern Shipping was a typographical error, due to the fact that Seagos also represents Southern Shipping in brokering charterers. (See Chen Reply Aff. ¶ 8.)

outside of the binding Titan/Guangzhou charter." (Pet'r Exh. 47 (emphasis in original).) Seagos did not reply. Instead, Titan received a fax from Guangzhou, which stated that Titan was "not allowed to be in breach of the ad hoc arbitration clause which is actually running." The fax also referred to an "alleged C/P." (Resp. Exh. 20.) Titan responded that since the parties could not agree on whether a valid charter party existed, it was "free to initiate this issue here [in New York]." (Piskora Aff. ¶ 12.)

DISCUSSION

Titan now petitions this Court pursuant to section 4 of the FAA (1) to determine summarily that there exists a binding charter between the parties and (2) to compel arbitration for breach of that agreement. For the reasons discussed below, the Court declines to dismiss the case for lack of jurisdiction or for improper venue, and holds that the parties have entered into a binding charter. Furthermore, the Court will compel arbitration in London to enforce the agreement.

I. Relevant Legal Standards

A. Motion to Dismiss Under Rules 12(b)(1), 12(b)(3)

On a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all factual allegations in the Complaint as true and "refrain from drawing inferences in favor of the party contesting jurisdiction." Serrano v. 900 5th Ave. Corp., --- F. Supp.2d ---, No. 97 Civ. 5829, 1998 WL 241623, at *1

(S.D.N.Y. May 13, 1998) (citing Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)). The Court is not confined to the Complaint, however. It may consider "evidence outside the pleadings, such as affidavits." Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991), vacated on other grounds, 505 U.S. 1215 (1992); accord Kamen v. AT&T, 791 F.2d 1006, 1011 (2d Cir. 1986).[6] Likewise, the Court may consider affidavits in deciding a Rule 12(b)(3) motion for improper venue. See ESI, Inc. v. Coastal Power Prod. Co., 995 F. Supp. 419, 422 (S.D.N.Y. 1998).

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[6] Thus, the standard for deciding a motion to dismiss for lack of subject matter jurisdiction is akin to that for summary judgment under Rule 56(e). Rule 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters sated therein . . . . The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion [] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . .

Rule 56(e) requires that the non-moving party oppose the motion with any of the evidentiary materials listed in Rule 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

B. Motion to Dismiss Under Rule 12(b)(2)

In determining a motion to dismiss for lack of personal jurisdiction, the Court also looks beyond the pleadings to affidavits submitted by the parties, considers the evidence in the light most favorable to the plaintiff, and resolves all doubts in its favor. PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). Prior to discovery, "the [plaintiff] need persuade the Court only that its factual allegations constitute a prima facie showing of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990).

II. Jurisdiction

Titan claims that there exists subject matter jurisdiction under § 9 of the FAA. Guangzhou, on the other hand, argues that it is immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). The Court concludes that it has subject matter jurisdiction under 28 U.S.C. § 1330(a), because Guangzhou waived its immunity under the FSIA.

A. Subject Matter Jurisdiction Under the FSIA

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. A defendant corporation that is owned entirely by a foreign state is also immune from the jurisdiction of

the Court. See id. §§ 1603(a), 1603(b)(2), 1604. If the immunity provisions of the FSIA are applicable, the Court is divested of subject matter jurisdiction over an action. NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2d Cir. 1993).

It is undisputed that defendant Guangzhou is wholly owned by the People's Republic of China. Therefore, in order for the Court to have jurisdiction over Titan's motion, there must be an applicable exception to foreign sovereign immunity under the FSIA. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 498 (1983). The burden is on Titan "to go forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (internal citations omitted). If an exception applies, the Court has subject matter jurisdiction over Guangzhou under 28 U.S.C. § 1330.

1. Arbitration Exception

The Court holds that Guangzhou has waived its immunity under § 1605(a)(6)(B) of the FSIA.[7] Section 1605(a)(6)(B) provides an exception to immunity in cases where a foreign state or sovereign entity has agreed to arbitrate a dispute and the arbitration

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[7] Although Titan has not raised § 1605(a)(6)(B) as a basis for subject matter jurisdiction, the Court may consider it sua sponte. See American Centennial Ins. Co. v. Seguros La Republica, S.A., No. 91 Civ. 1235, 1996 WL 304436, at *15 n. 23 (S.D.N.Y. June 5, 1996); Gabay v. Mostazafan Found. of Iran, 151 F.R.D. 250, 255 n.8 (S.D.N.Y. 1993) (citing Verlinden, 461 U.S. at 493 n. 20), aff'd, (2d Cir. 1994).

agreement is or may be governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. Congress has authorized the district courts to compel arbitration under the Convention in accordance with the agreement, including arbitration at sites outside the U.S. Id. § 203.

Here, Titan alleges that it entered into a charter party with Guangzhou that provided for arbitration in London, which is enforceable under the Convention. Guangzhou contends that the charter party was never formed, because Titan never completed the subjects precedent to the agreement. The U.S. and China are both parties to the Convention.

Cargill International S.A. v. M/T Pavel Dybenko is on point. In Cargill, the Second Circuit Court of Appeals considered whether a district court had subject matter jurisdiction to determine whether a charter party, which contained an arbitration clause, applied in a particular case between a sovereign-owned company an a plaintiff that was a third party to the charter. The Court hel that the district court had "jurisdiction to determir jurisdiction," and directed the court to consider "whatev evidence has been submitted" by the parties. 991 F.2d at 10

(citations omitted). The Court reasoned that regardless of whether there existed an agreement to arbitrate that could be enforced by the plaintiff -- the alleged beneficiary of the agreement -- the Court had jurisdiction to determine whether "the arbitration agreement in the Charter Party was intended to benefit [the plaintiff]." Id. Of particular importance to the Court was that "the Convention should be broadly interpreted," "when . . . read together with the FSIA[]." Id. at 1018. It is significant that Cargill was not seeking to enforce an arbitral award, but to determine whether it was a beneficiary of the contract and to enforce the arbitration agreement. Compare id. at 1017-18 with Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 577-79 (2d Cir. 1993) (enforcing arbitration award while distinguishing cases where plaintiff sought to have award enforced from cases in which there had been no award).

Cargill is applicable here, where the parties have allegedly entered into an agreement to arbitrate which is governed by the Convention and which is enforceable by the Court. See 991 F.2d at 1020 ("if [the plaintiff] is found to be a third party beneficiary to the Charter Party, it may be proper for the district court to enforce the arbitration agreement against [the defendant]"); see also 9 U.S.C. § 206 (allowing court to order arbitration under the FAA). According to Cargill, the FSIA must be read with the FAA t give the Convention a broad interpretation. Accordingly, the Cour concludes that it has subject matter jurisdiction to determir

whether the parties entered into a binding charter party agreement that required arbitration in London.

2. Commercial Activities Exception

Alternatively, the Court has subject matter jurisdiction over the action pursuant to § 1605(a)(2) of the FSIA, which provides, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the Unites states in any case . . . in which the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Court concludes that Guangzhou's actions, taken in China, caused a "direct effect" in the U.S. and that those of its broker, Seagos, were taken "in connection with a commercial activity" of Guangzhou in China.

In order for an act taken "in connection with a commercial activity" to provide an exception to foreign sovereign immunity, it must be a "legally significant act." See Hanil Bank v. PT. Bank Negara Indonesia, --- F.3d ---, No. 97 Civ. 7961, 1998 WL 334342, at *6 (2d Cir. June 24, 1998); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993); WMW Machinery, Inc. v. Werkzeugmaschinenhandel GmbH IM Aufbau, 960 F. Supp. 734, 741 (S.D.N.Y. 1997). "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)

(quoting Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).

Here, Guangzhou negotiated a contract with Titan, a U.S. corporation, by faxes sent to Titan and both parties' brokers in the U.S. The act of making and directing this correspondence was "an act [taken] outside the . . . United States," "in connection with a commercial activity . . . elsewhere," that caused Titan allegedly to suffer a "direct effect" -- $1 million in damages -- in the U.S. See Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Co., No. 90 Civ. 4169, 1993 WL 541236, at *8 (S.D.N.Y. 1993).

That Guangzhou was "transacting business" with Titan in the U.S. and directing negotiations in this country is enough for it to have waived immunity under § 1605(a)(2) with respect to the formation of the charter party at issue here. See Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1113 (S.D.N.Y. 1982); see also Supra Med. Corp. v. McGonigle, 955 F. Supp. 374, 382 (E.D. Pa. 1997) (finding sufficient "intentional communications with [plaintiff] giv[ing] rise to the underlying suit"). Titan's identity as a U.S. corporation further strengthens this conclusion. See International Housing Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11 (2d Cir. 1989) (fact that plaintiff is "a U.S. corporation . . . is relevant to whether [its] financial losses . . . constituted

a 'direct effect'"); Note, Effects Jurisdiction Under the FSIA and the Due Process Clause, 55 N.Y.U. L. REV. 474, 512 (1980).[8]

Because we find a "significant, legal connection" with the U.S. giving rise to Titan's claim, which caused a direct effect in the U.S., we have subject matter under the FSIA with respect to the formation of the charter party.[9]

B. Personal Jurisdiction

For the same reasons, we conclude that the Court has personal jurisdiction over Guangzhou. See Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (citations omitted); New York Bay Co. v. State Bank of Patiala, No. 93 Civ. 6075, 1994 WL 369406, at *4 (S.D.N.Y. July 12, 1994); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 n.3 (1989) ("personal jurisdiction, like subject matter jurisdiction, exists

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[8] The cases relied on by defendant do not dictate a different result. In fact, in two of these cases, the Court of Appeals suggested that the actions of a broker could be sufficient to confer jurisdiction over a foreign sovereign defendant. See Stena Rederi AB v. Comision de Contractos, 923 F.2d 380, 389 (5th Cir. 1991); Gregorian v. Izvestia, 871 F.2d 1515, 1527-28 (9th Cir. 1989). The Court declined to find subject matter jurisdiction in these cases, however, because the relevant facts either had not been timely presented, see Gregorian, 871 F.2d at 1528, or had not been presented at all to the district court, see Stena Rederi, 923 F.2d at 389.

[9] It is not entirely relevant that Guangzhou did not initiate negotiations with Titan or solicit its business in the U.S. While a defendant that regularly does business in the U.S. will more easily be amenable to the general jurisdiction of this Court, with respect to the legal obligations arising out of the negotiation of the charter party, Guangzhou's communications, and those of its broker, are sufficient to establish subject matter jurisdiction.

only when one of the exceptions to foreign sovereign immunity . . . applies"). This is because under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). Since the Court has subject matter jurisdiction over the action and there is no dispute that defendant Guangzhou was properly served pursuant to 28 U.S.C. § 1608, the statutory requirements for personal jurisdiction are met.

The FSIA, however, "cannot create personal jurisdiction where the Constitution forbids it." Texas Trading, 647 F.2d at 308. Consequently, "[e]ach finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant." Id.; accord Seetransport, 989 F.2d at 580. Due Process requires that the foreign sovereign entity have "minimum contacts" with the United States "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted). In a case brought under the FSIA, a court may consider contacts beyond the forum state. See Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir. 1985) ("the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States"); see also Graham C. Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 VA. L. REV. 85, 130 (1983) ("it [is] reasonably clear that national -- not state --

contacts are decisive"). Moreover, "actions relevant to the [case] by an agent on [a] defendant[']s behalf" can support personal jurisdiction over a defendant. Texas Trading, 647 F.2d at 314.[10]

The Court concludes that it has personal jurisdiction over Guangzhou because Guangzhou hired Seagos, which is located in Connecticut, to broker the BIN HE, and which then directed communications at issue to Seabrokers and to Titan to negotiate the charter party. See Reed Int'l Trading Corp. v. Donau Bank AG, 866 F. Supp. 750, 755 (S.D.N.Y. 1994) (exercising personal jurisdiction over foreign sovereign defendant where defendant had appointed U.S. bank as "advising bank" for letters of credit at issue); Crimson Semiconductor, Inc. v. Electronum, 629 F. Supp. 903, 905, 908 (S.D.N.Y. 1986) (same, where defendant's representatives negotiated agreement in the U.S.). Moreover, there is evidence in the record to suggest that Guangzhou may have sent some of these communications directly to Seagos by fax from China. See Sealift Bulkers, Inc. v. Republic of Armenia, 965 F. Supp. 81, 85 (D.D.C. 1997) (personal jurisdiction where defendant used U.S. telecommunications systems to correspond with plaintiff); Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F. Supp. 688, 691 (S.D.N.Y. 1986) (same). Accordingly, Guangzhou's contacts with the

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10 While plaintiff bears the burden of establishing the Court's personal jurisdiction over the defendant, CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986), plaintiff need only make a prima facie showing that jurisdiction exists where, as here, there has been no evidentiary hearing. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996).

United States are sufficient to establish personal jurisdiction in this action. By appointing a representative in Connecticut to negotiate the charter party at issue in this case, Guangzhou "purposefully avail[ed] itself of the privilege of conducting activities with the [United States]." Weltover, 504 U.S. at 620 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (alterations in original). Guangzhou may not avail itself of U.S. clients, by directing communications to the U.S., without being held responsible for the content of these communications in the U.S. Accord Sealift, 965 F. Supp. at 85-86. Given its conduct, Guangzhou should reasonably have expected that it could be haled into court here, were it to break off negotiations, because it directed the negotiations here, through Seagos, and because Titan, the target of its negotiations, is located here. See Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Hanil Bank, 1998 WL 334342, at *8; see also Supra Medical, 955 F. Supp. at 382-83 ("[defendant] cannot now . . . complain about a suit concerning the effect of negotiations in the jurisdiction in which some of those negotiations occurred").[11]

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[11] We find unavailing respondent's argument that its contacts cannot be measured by the activities of its broker. (See Resp. Reply Mem. at 2-4.) Guangzhou maintained a relationship with Seagos whereby Seagos would "perform[] the usual broker's role of collecting hire on a charter . . . . [by] passing messages back and forth between the parties to a transaction . . . and trying to smooth out trouble spots." (Chen Reply Aff. ¶¶ 2, 5.) Thus, Seagos played an "active role as an intermediary between [Guangzhou] and [Titan]," International Housing, 893 F.2d at 12, that can be taken into account when determining jurisdiction, regardless of whether Seagos is deemed Guangzhou's "broker," "agent," or "representative." See Interocean Shipping Co. v.

III. Venue

We also hold that venue is proper in this Court under 28 U.S.C. § 1391(b). Under this section, "a civil action wherein jurisdiction is not founded solely on the diversity of citizenship . . . may, except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Despite its limiting language, courts have routinely held that § 1391(b) allows venue in more than one district. See Bates v. C & S Adjusters, 980 F.2d 865, 867 (2d Cir. 1992) ("the admonition against recognizing multiple venues has been disapproved"); PI, Inc. v. Quality Prods., Inc., 907 F. Supp. 752, 757 (S.D.N.Y. 1995) ("Venue is proper in each district that is the situs of a substantial part of the events or omissions giving rise to the claim.").

Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper. D'Anton Jos, S.L. v. Doll Factory, Inc., 937 F. Supp. 320, 321 (S.D.N.Y. 1996); French Transit, Ltd. v. Modern Coupon Systs., Inc., 858 F.

National Shipping & Trading Corp., 523 F.2d 527, 537 (2d Cir. 1975) ("[i]t is immaterial that [the intermediary] thought of himself as a 'broker' and not an 'agent' . . . or that [defendant] did not intend to make [him] an agent"). Guangzhou does not anywhere question Seagos's authority to broker the arrangement at issue here. Cf. Storr v. National Defence Sec. Council of the Republic of Indonesia-Jakarta, No. 95 Civ. 9663, 1997 WL 633405, at *2-3 (S.D.N.Y. Oct. 14, 1997) (considering whether signatories to promissory notes had actual or apparent authority from defendant); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 85-86 (S.D.N.Y. 1991) (finding that broker did not have authority to "fix vessels without [defendant's] approval").

Supp. 22, 24 (S.D.N.Y. 1994). Titan therefore bears the burden of establishing that a substantial part of the events giving rise to the lawsuit occurred in the Southern District of New York.

Titan argues that venue is proper here because the writings at issue were negotiated by means of facsimiles and telephone calls between Pelham, New York and Stamford, Connecticut. We agree. These faxes reflect "a substantial part of the events" giving rise to the present claim because the action alleges the creation of a binding charter party through these writings. See Sacody Tech., Inc. v. Avant, Inc., 862 F. Supp. 1152, 1157 (S.D.N.Y. 1994) (venue requirements "may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action"); see also Constitution Reins. Corp. v. Stonewall Ins. Co., 872 F. Supp. 1247, 1250 (S.D.N.Y. 1995) (venue proper in breach of contract action where contracts were negotiated through telephone calls and faxes between New York and Texas).

IV. Summary Determination of the Making of a Charter Party

Now that the Court has determined that jurisdiction and venue are proper, we must determine whether the parties have agreed to arbitrate the formation of the charter party. We hold that they did not. However, the parties did enter into a binding charter party, by which they agreed to arbitrate disputes in London, upon the election of either party. Because Titan has petitioned this Court to order arbitration, we order such arbitration to determine

the parties' rights under the charter party, pursuant to Shell Time 4.

A. Ad Hoc Agreement to Arbitrate Existence of Charter Party

Guangzhou argues that the parties agreed to arbitrate the very existence of the charter party and, accordingly, that Titan's motion must be dismissed. We disagree. Given the evidence, we conclude that the parties did not enter into the "ad hoc" arbitration agreement advocated by Guangzhou.[12]

Because "arbitral jurisdiction is rooted in the consent of the parties," Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir. 1991), the existence of an agreement to arbitrate is a threshold question for a court to resolve, absent a clear and unmistakable delegation of that authority to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986); National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 135 (2d Cir. 1996); see also Maye v. Smith Barney Inc., 897 F. Supp. 100, 106 n. 3 (S.D.N.Y. 1995) ("the question of whether the parties ever made an agreement to arbitrate is . . . to be decided by the courts"). While due regard must be

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[12] While Section 4 of the FAA directs the court to conduct an evidentiary hearing where the existence of an arbitration agreement is in dispute, see McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980), no such hearing is required here because the parties agree to the material facts at issue. See In re Stinnes Interoil, Inc., No. 87 Civ. 1371, 1989 WL 11409, at *4 (S.D.N.Y. Feb. 8, 1989).

given to federal policy favoring arbitration, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), where the parties contest the formation of an agreement, "any silence or ambiguity about whether such a question is arbitrable reverses the usual presumption that issues should be resolved in [arbitration's] favor." Abram Landau Real Estate v. Benova, 123 F.3d 69, 72 (2d Cir. 1997) (citing First Options, 514 U.S. at 943). The question of the formation of the charter party, like that of any other contract, is a question of federal common law. See First Options, 514 U.S. at 943; Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987).

From the evidence, it is clear that the parties did begin negotiating an "ad hoc" arbitration agreement that contained terms different than the original charter party. According to the parties, on November 1 Seagos proposed arbitration to "resolve the dispute" as to whether the parties had made a binding charter. That same day, Titan proposed arbitration before a panel of three arbitrators in New York. However, the evidence also suggests that on November 2, Guangzhou cut off negotiations on the ad hoc agreement through Seagos, which, in response to Titan, stated that the "Shell Time 4" "is very clear on the [form of arbitration] which has been agreed by U.S. Titan. There is no need for a separate arbitration agreement." We find this language controlling; with it,

Seagos, on behalf of Guangzhou, definitively ended negotiations on the "ad hoc agreement."[13] That it was Guangzhou's intent to end these negotiations is clear from its remaining correspondence, which called for London arbitration "pursuant to the Shell Time 4 clause 41." Cf. Northern Tankers Cyprus Ltd. v. Lexmar Corp., 781 F. Supp. 289, 290-91 (S.D.N.Y. 1992) ("agreement to arbitrate, separate and distinct from that contained in the charter party," was formed where plaintiff demanded arbitration "for damages caused by [defendant's] non-performance of the charter," and defendant accepted that demand). Because the parties' negotiations with respect to the "ad hoc" agreement did not come to fruition, we cannot order arbitration on the issue of whether the charter party was in fact formed.

B. The Charter Party

We do, however, order arbitration with respect to Guangzhou's alleged breach of the charter party, because we conclude that a

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[13] We are unpersuaded by Guangzhou's suggestion that it referred to the "Shell Time 4" and "Camaro pro forma" because the parties were familiar with the terms of such agreements, and not because the parties were in fact bound by those agreements. (See Chen Aff. ¶ 10; Resp. Reply Mem. at 15-16.) As defendant concedes, a party is bound by the natural meaning of its words. From this correspondence, Titan could only conclude that Guangzhou was referring to the arbitration clause in the charter party, which had been duly negotiated by Seagos and Seabrokers. Thus, we do not agree that by referring to the "agreement," Titan meant the "ad hoc" agreement at issue here. (See Resp. Mem. at 16.) If anything, confusion as to which agreement was being referenced during negotiations cuts in Titan's favor, that no ad hoc agreement to arbitrate was formed. Where parties minds do not meet on the meaning of an essential term, no enforceable contract is formed. See, e.g., Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) (the famous "Peerless" case).

charter party providing for arbitration was formed. Whether a charter party has been formed is a question of fact. Sun Int'l Ltd. v. Terrabo Petroleum Co., 747 F.2d 108, 110 (2d Cir. 1984). The Court, however, may determine whether a charter party exists, if the underlying material facts are not in dispute. See Great Circle Lines, Ltd. v. Matheson & Co., 681 F.2d 121, 124 (2d Cir. 1982). As with any other contract, a charter party is formed when there is a "meeting of the minds" on its essential terms. Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673, 676 (2d Cir. 1972); A/S Custodia v. Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir. 1974). It is not necessary that the proposed charter be signed by either party, id., and even an oral charter party is enforceable by a court of law, Great Circle Lines, 681 F.2d at 124 ("binding charter engagements have historically been assumed on nothing more formal than a nod of a head").

In any case, it is undeniable that charter parties can be and more often than not are formed by way of facsimile or telex. See id.; In re J. Lauritzen A/S, No. 84 Civ. 8704, 1986 WL 13441, at *2 (S.D.N.Y. June 5, 1986). This is because "[t]he shipping industry is a fast moving . . . business, where dealings between the parties . . . are usually conducted . . . under severe time restraints." Great Circle Lines, 681 F.2d at 125. To arrange expeditiously what would otherwise be complicated and time consuming, "brokers [customarily] receive and send telex [or fax] traffic all over the world." Id. On the facts before us, the existence of a binding charter party is clear. The parties negotiated a charter through

their respective brokers, which was confirmed by facsimile on September 26, 1995 by Seagos, which "recap[ped] Owners and Charterers' agreement." A "recap" communication, or "fixture," is recognized throughout the shipping industry as an agreement to a charter party's essential terms. See Great Circle Lines, 681 F.2d at 125 & n.2; Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1345 (S.D.N.Y. 1988); see also P.E.P. Shipping (Scandinavia) ApS. v. Noramco Shipping Corp., No. 96 Civ. 3136, 1997 WL 358118, at *2 n.1 (E.D. La. June 24, 1997) ("[a] fixture presupposes a final contract with main terms set and final details to be resolved") (citing Great Circle Lines, 681 F.2d at 125 n.2); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 81 n.3 (S.D.N.Y. 1991)("[a] 'recap telex' recapitulates the terms of [a] fixture that have been agreed upon").[14] Thus, the "recap" fax represented an agreement as to the charter party's main terms, which

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[14] We are equally unpersuaded by respondent's argument that John Raby's affidavit regarding industry custom should be ignored. "It is well established that testimony concerning trade practices and customs is admissible to enable the Court 'to evaluate the conduct of the parties.'" Oriental Commercial & Shipping Co. v. Rosseel, N.V., 702 F. Supp. 1005, 1015 (S.D.N.Y. 1988) (quoting Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505, 509 (2d Cir. 1977)). Mr. Raby is an experienced ship broker and one of Seagos's principals. He has personal knowledge not only of the negotiation of the charter party at issue, but the shipping industry as a whole. Moreover, "[c]ertain long-standing customs of the shipping industry [such as the procedure for brokering charter parties] are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract." Great Circle Lines, 681 F.2d at 125. Thus, had Titan not submitted a statement as to industry practice in this case, we would nevertheless consider it here. See id.; see also Samsun Corp. v. Khozestan Mashine Kar Co., 926 F. Supp. 436, 439 (S.D.N.Y. 1996) ("established practices and customs of the shipping industry inform the court's analysis" of the making of a charter party).

were in accordance with the Shell Time 4, a standard form charter. Accordingly, the parties had entered into a binding agreement as of September 26, 1995, which incorporated each of the Shell Time 4's terms. Cf. Samsun, 926 F. Supp. at 441 ("[t]he legal effect of adopting [form charter) is inescapable"); Keystone Shipping Co. v. Compagnie Marocaine de Navigation, No. 89 Civ. 1028, 1990 WL 104029, at *4 (S.D.N.Y. July 19, 1990) (fixture incorporating form charter is binding where it "embodi[ed]" form).

Moreover, we do not agree with defendant that the charter did not come into effect because of the alleged failure of one of its "subjects," the approval of the charter by Titan's board of directors upon receiving the final inspection report of the BIN HE. First, this argument directly contradicts the weight of the evidence, which suggests that the Board did approve the BIN HE within the agreed time period. Second, even had this "subject" failed, it did not vitiate the charter that had already been formed. It is well established that a "subject detail" does not create a condition subsequent to a charter party. See Great Circle Lines, 681 F.2d at 126; In re Pollux Marine Agencies, Inc., 455 F. Supp. 211, 223 (S.D.N.Y. 1978). In our opinion, there existed a binding charter party between Titan and Guangzhou, in the form of "Shell Time 4," beginning September 26, 1995. Cf. E.A.S.T., Inc. of Stamford v. M/V Alaia, 673 F. Supp. 796, 800 (E.D. La. 1987) (charter not conditioned on plaintiff's acceptance of vessel because

charter formed upon agreement of main terms), aff'd, 876 F.2d 1168 (5th Cir. 1989).[15]

Because there exists a charter between the parties, Titan must arbitrate its dispute in London, according to the Shell Time 4. Cf. Interocean, 523 F.2d at 531 (form charter's arbitration clause bound parties where fixture telex adopted "Mobiltime form charter"); Keystone, 1990 WL 104029, at *4 (compelling arbitration where fixture provided that voyage be governed "per terms and conditions of the North American Grain charter party (pro forma 1982)," which contained arbitration clause); In re Pollux, 455 F. Supp. at 213-14 (same, where defendant confirmed "having fixed the foil . . . subject details of Eldece Time," and aforesaid form charter had arbitration clause). The parties agreed to this form charter, as well as to the inclusion of an arbitration clause, until well after this dispute arose. As both parties were familiar to its form, it controls. See P.E.P. Shipping, 1997 WL 358118, at *3.

Moreover, even in the absence of a binding charter party, we would order arbitration in London under the Shell Time 4, because the parties agreed to arbitration in that forum by referencing that form charter while negotiating their own charter's terms. See Samsun, 926 F. Supp. at 441 ("A reference to a familiar charter

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[15] Nor do we agree that Titan rejected the BIN HE by its fax of October 19, 1995. This fax states only that it had "concerns" regarding the condition of the BIN HE that Guangzhou had already been working on. In any event, because we have determined that the parties entered into a binding charter party on September 26, 1995, any communication by Titan in October would have no effect on its terms.

party form which provides for arbitration . . . binds the parties to arbitrate any disputes [in the forum provided] . . . even though the formal charter party is not executed until later (or not at all)"). Respondent "was placed on notice, one way or the other," that disputes as to the charter party -- including formation -- could be arbitrated in London. Id. Thus, by ordering arbitration in London, the Court gives Guangzhou the benefit of its bargain.

CONCLUSION

For the foregoing reasons, we grant petitioner's motion for a summary determination as to the formation of a charter party; deny respondent's cross motion to dismiss for lack of jurisdiction and improper venue; deny respondent's application for attorney's fees; and grant respondent's motion to stay these proceedings to the extent consistent with this Opinion and Order. The parties are directed to arbitrate in London any other disputes arising under the time charter pursuant to the provisions of the Shell Time 4.

SO ORDERED.

Dated: White Plains, New York
August 5, 1998

William C. Conner
Senior United States District Judge

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

U.S. TITAN, INC.,

Petitioner,

- against -

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

- X

96 Civ. 8936 (MGC)

OPINION #98,0028 MGC
AND ORDER

U.S. DISTRICT COURT FILED W.P. AUG 05 1998 S.D. OF N.Y.

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Conner, Senior D.J.:

This case is currently before the Court on petitioner U.S. Titan, Inc.'s ("Titan") motion for a summary determination of the making of a binding charter party agreement between Titan and respondent Guangzhou Zhen Hua Shipping Co., Ltd. ("Guangzhou"), and to compel arbitration on Titan's claim for breach of contract, pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 4. Guangzhou has cross-moved to dismiss the action for lack of jurisdiction and improper venue under Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(3), or alternatively, to stay the proceedings pursuant to 9 U.S.C. § 3 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. (the "Convention").

For the reasons discussed below, the Court finds that the parties have entered into a binding charter party agreement that requires arbitration of their dispute; grants petitioner's motion to compel arbitration; and denies respondent's cross-motion to dismiss or stay the action.[1]

[1] The Court will "stay" the action to the extent that it orders arbitration in London concerning Guangzhou's alleged breach of the charter party. See 9 U.S.C. § 3. It does not, however, stay the action with respect to the summary determination of a charter party.

BACKGROUND

The facts, according to plaintiff, are as follows. Titan is a corporation organized under the laws of Texas, with its principal place of business in Pelham, New York. Guangzhou is a state-owned corporation organized under the law of the People's Republic of China, with its principal place of business in Canton, China. At all pertinent times, Guangzhou owned and operated the M/T BIN HE (the "BIN HE"), an ocean-going Chinese-flag tanker.[2]

On or about August 22, 1995, the parties began negotiating a time charter[3] of the BIN HE, through their respective brokers -- Seagos Company, Inc. ("Seagos") of Stamford, Connecticut, on behalf of Guangzhou, and Seabrokers, Inc. ("Seabrokers"), also of

[2] Guangzhou claims that it did not own the BIN HE and merely chartered it from Zhu Hai Shipping Enterprise Ltd., its true owner. (Chen Reply Aff. ¶ 9.) Whether Guangzhou was BIN HE's owner, however, has little if anything to do with its obligations under the alleged charter party. To the extent that ownership of the BIN HE may be relevant, it can be determined by the arbitrator, who, as we conclude, must decide all disputes arising under the charter party. See Dover S.S. Co. v. Summit Indus. Corp., 148 F. Supp. 206, 209 (S.D.N.Y. 1957); see also Tarstar Shipping Co. v. Century Shipline, Ltd., 451 F. Supp. 317, 321-22 (S.D.N.Y. 1978) (charter existed between parties that negotiated agreement, even though "owner's name . . . was not mentioned when the vessel was fixed and confirmed by telex"), aff'd, 597 F.2d 837 (2d Cir. 1979).

[3] A charter party is "a contract by which an entire ship or some principal part thereof is let to a merchant . . . ." Jhirad & Sann, 1 Benedict on Admiralty § 225 (7th ed. 1981). In a charter party, the terms and conditions of the lease of a vessel by an owner to a charterer are set out. Gilmore & Black, The Law of Admiralty § 4-1 (2d ed. 1975). With a time charter, "the owner[] . . . continues to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period." Id.

Stamford, on behalf of Titan. The charter contained three "subjects," or conditions: (1) Titan's satisfactory inspection of the BIN HE; (2) the release of the vessel from its previous charterer, "Canaro"; and (3) the approval of the charter party by Titan's board of directors within three days of the board's receipt of the final inspection report.[1] (See Pet'r Exh. 29.) On September 22, 1995, Guangzhou offered to charter the BIN HE to Titan for 12 months at $15,250 per day, with an option for an additional twelve months at $15,750 per day. During the next few days, the parties negotiated different periods and rates, as well as several other terms. Ultimately, on September 26, Guangzhou responded with a "firm counter offer" as follows:

". . . Accept/Except:

Period - 6 mos. plus/minus 30 days at CHOPT

CHOPT next 12 mos. . . .

Rates - $15,250 first period

Optional $15,750 second period."

(Pet'r Exh. 18.)

That same day, Titan informed Seabrokers that "Charterers are in agreement and accept Owner[']s last offer." (Pet'r Exh. 19.) Seabrokers then sent Titan a fixture telex "recap[ping] Owners and Charterers' agreement." (Pet'r Exh. 1.) The agreement was based on the "Shelltime 4 Time Charter," a standard time charter, and contained the above subjects. (Id.) The Shell Time 4 Charter contained an arbitration clause, providing for arbitration in London, at the election of either party. (See Pet'r Exh. 4.)

Thereafter, the BIN HE was dry-docked in Hong Kong and inspected by Denholm Ship Management (Overseas) Ltd. ("Denholm"). On October 19, Titan received Denholm's initial report. (Warfield Aff. ¶ 16.) On October 23, Titan informed Seabrokers that it had concerns about the seaworthiness of the BIN HE, but that it was awaiting Denholm's final inspection report. (Id. ¶ 18 & Exh. 10.) Then, on October 25, Titan informed Seabrokers that it had received the full Denholm report and that it had "lift[ed its] inspection subject." (Pet'r Exh. 34.) It also stated that Titan "now look[ed] to [the] Owners to lift their Canaro withdrawal subject . . . . [and that] the Titan board will make its decision within . . . three working days after the lifting of this subject per [the] 9/26 agreement." (Id.) On October 26, 1995, Seabrokers informed Titan that the BIN HE had been withdrawn from Canaro. (See Pet'r Exh. 30.) Titan thereupon replied that it would respond with board approval "by close of New York [business] Monday Oct. 30." On October 27, 1995, Titan notified Seabrokers that its board had approved the charter. (Pet'r Exh. 21.)

Guangzhou presents a slightly different version of events. According to Guangzhou, Titan rejected the BIN HE by its October 23 telex, which informed Seagos that the vessels' machinery spaces were "in terrible condition," and that the vessel was not "up to an acceptable trading standard." (Chen Aff. ¶ 10 & Exh. 5.) Seagos informed Seabrokers that in view of Titan's rejection of the vessel, the conditions to which the charter had been subject had failed to occur. (Id. ¶ 10 & Exh. 6.)

Additionally, Guangzhou maintains that on October 24, Seabrokers confirmed that Titan had rejected the vessel, and that the subjects had therefore failed. (Id. ¶ 11 & Exh. 7.) Moreover, according to Guangzhou, on October 25, "Titan reversed its position and attempted to assert that the vessel had not failed the inspection." Guangzhou claims that it then terminated all negotiations with Titan. (Id. ¶ 13 & Exh. 9.)

On November 1, in a facsimile to Titan, Seagos suggested arbitration to resolve the dispute. (See id. ¶¶ 16-17 & Exh. 12.) Later that day, Titan proposed that the parties submit the matter "to three arbitrators in New York who would have 45 days . . . to issue a ruling on the threshold issue of whether the parties entered into a binding agreement on September 26 subject to conditions that were subsequently fulfilled." (Pet'r Exh. 39.) On November 2, Seabrokers responded that the "Shell Time 4 Canaro proforma is very clear on the simplified arbitration which has been agreed by U.S. Titan and is agreeable to Southern Shipping as well. There is no need for a separate arbitration agreement at all." (Pet'r Exh. 40.)[2] Titan then sent "formal written notice of

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[1] Defendant, on the other hand, takes the view that the board was to approve the proposed charter party within three days of the actual inspection of the BIN HE.

[2] Titan claims that Seagos did not understand the reference to "Southern Shipping," and to have believed that the reference to "Shell Time 4 Canaro" referred to the charter between Guangzhou and Canaro, which, in part, was to be assumed by Titan. Complaint

Arbitration" to Seagos, advising it that arbitration was to follow "the Shell Time 4 clause 41(c) of Canaro/Titan Charter Party." (Pet'r Exh. 41.) On November 7, Titan sent a follow-up fax to Seagos, requesting confirmation that arbitration would be held under clause 41(c) of the charter party. (Pet'r Exh. 42.) Seagos replied, "London arbitration in accordance with Clause 41(c)." (Pet'r Exh. 43.) On November 9, Titan once again faxed Seagos, asking for confirmation that "arbitration proceedings in London are to [be] . . . in accordance with Clause 41(c) of the Shell Time 4 Guangzhou/Titan Proforma, which is based on the 'Canaro' Charter." (Pet'r Exh. 44.) Seagos replied that "both parties" had agreed to London arbitration "to ascertain whether there is a charter between Guangzhou . . . and . . . Titan." (Pet'r Exh. 45.) Titan then sent another fax to Seagos, stating that "arbitration in London is acceptable per the agreement." (Pet'r Exh. 46.)

Following these exchanges, the parties attempted to select a London arbitrator. In one such communication, sent directly from Guangzhou to Seabrokers, Guangzhou reiterated that it had agreed to submit the matter to arbitration "pursuant to the Shell Time 4 Clause 41." (Resp. Exh. 18.) No agreement was reached as to the identity of the arbitrators.

On February 7, 1996, Titan again wrote to Seagos. Among other things, the fax stated that Titan would "not agree to arbitration outside of the binding Titan/Guangzhou charter." (Pet'r Exh. 47 (emphasis in original).) Seagos did not reply. Instead, Titan received a fax from Guangzhou, which stated that Titan was "not allowed to be in breach of the ad hoc arbitration clause which is actually running." The fax also referred to an "alleged C/P." (Resp. Exh. 20.) Titan responded that since the parties could not agree on whether a valid charter party existed, it was "free to initiate this issue here [in New York]." (Piskora Aff. ¶ 12.)

explains that the reference to Southern Shipping was a typographical error, due to the fact that Seagos also represents Southern Shipping in brokering charterers. (See Chen Reply Aff. ¶ 8.)

DISCUSSION

Titan now petitions this Court pursuant to section 7 of the FAA (1) to determine summarily that there exists a binding charter between the parties and (2) to compel arbitration for breach of that agreement. For the reasons discussed below, the Court declines to dismiss the case for lack of jurisdiction or for improper venue, and holds that the parties have entered into a binding charter. Furthermore, the Court will compel arbitration in London to enforce the agreement.

I. Relevant Legal Standards

A. Motion to Dismiss Under Rules 12(b)(1), 12(b)(3)

On a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all factual allegations in the Complaint as true and "refrain from drawing inferences in favor of the party contesting jurisdiction." Serrano v. 900 5th Ave. Corp., --- F. Supp.2d ---, No. 97 Civ. 5829, 1998 WL 241623, at *1 (S.D.N.Y. May 13, 1998) (citing Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)). The Court is not confined to the Complaint, however. It may consider "evidence outside the pleadings, such as affidavits." Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991), vacated on other grounds, 505 U.S. 1215 (1992); accord Kamen v. AT&T, 791 F.2d 1006, 1011 (2d Cir. 1986).[4] Likewise, the Court may consider affidavits in deciding a Rule 12(b)(3) motion for improper venue. See ESI, Inc. v. Coastal Power Prod. Co., 995 F. Supp. 419, 422 (S.D.N.Y. 1998).

[4] Thus, the standard for deciding a motion to dismiss for lack of subject matter jurisdiction is akin to that for summary judgment under Rule 56(e). Rule 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters sated therein . . . . The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion [] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . .

Rule 56(e) requires that the non-moving party oppose the motion with any of the evidentiary materials listed in Rule 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

B. Motion to Dismiss Under Rule 12(b)(2)

In determining a motion to dismiss for lack of personal jurisdiction, the Court also looks beyond the pleadings to affidavits submitted by the parties, considers the evidence in the light most favorable to the plaintiff, and resolves all doubts in its favor. PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). Prior to discovery, "the [plaintiff] need persuade the Court only that its factual allegations constitute a prima facie showing of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990).

II. Jurisdiction

Titan claims that there exists subject matter jurisdiction under § 9 of the FAA. Guangzhou, on the other hand, argues that it is immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). The Court concludes that it has subject matter jurisdiction under 28 U.S.C. § 1330(a), because Guangzhou waived its immunity under the FSIA.

A. Subject Matter Jurisdiction Under the FSIA

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. A defendant corporation that is owned entirely by a foreign state is also immune from the jurisdiction of the Court. See id. §§ 1603(a), 1603(b)(2), 1604. If the immunity provisions of the FSIA are applicable, the Court is divested of subject matter jurisdiction over an action. NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2d Cir. 1993).

It is undisputed that defendant Guangzhou is wholly owned by the People's Republic of China. Therefore, in order for the Court to have jurisdiction over Titan's motion, there must be an applicable exception to foreign sovereign immunity under the FSIA. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). The burden is on Titan "to go forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (internal citations omitted). If an exception applies, the Court has subject matter jurisdiction over Guangzhou under 28 U.S.C. § 1330.

1. Arbitration Exception

The Court holds that Guangzhou has waived its immunity under § 1605(a)(6)(B) of the FSIA.[7] Section 1605(a)(6)(B) provides an exception to immunity in cases where a foreign state or sovereign entity has agreed to arbitrate a dispute and the arbitration agreement is or may be governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. Congress has authorized the district courts to compel arbitration under the Convention in accordance with the agreement, including arbitration at sites outside the U.S. Id. § 203.

Here, Titan alleges that it entered into a charter party with Guangzhou that provided for arbitration in London, which is enforceable under the Convention. Guangzhou contends that the charter party was never formed, because Titan never completed the subjects precedent to the agreement. The U.S. and China are both parties to the Convention.

Cargill International S.A. v. M/T Pavel Dybenko is on point. In Cargill, the Second Circuit Court of Appeals considered whether a district court had subject matter jurisdiction to determine whether a charter party, which contained an arbitration clause, applied in a particular case between a sovereign-owned company and a plaintiff that was a third party to the charter. The Court held that the district court had "jurisdiction to determine jurisdiction," and directed the court to consider "whatever evidence has been submitted" by the parties. 991 F.2d at 1019

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[7] Although Titan has not raised § 1605(a)(6)(B) as a basis for subject matter jurisdiction, the Court may consider it sua sponte. See American Centennial Ins. Co. v. Seguros La Republica, S.A., No. 91 Civ. 1235, 1996 WL 304436, at *15 n. 23 (S.D.N.Y. June 5, 1996); Gabay v. Mostazafan Found. of Iran, 151 F.R.D. 250, 255 n.8 (S.D.N.Y. 1993) (citing Verlinden, 461 U.S. at 493 n. 20), aff'd, (2d Cir. 1994).

(citations omitted). The Court reasoned that regardless of whether there existed an agreement to arbitrate that could be enforced by the plaintiff -- the alleged beneficiary of the agreement -- the Court had jurisdiction to determine whether "the arbitration agreement in the Charter Party was intended to benefit [the plaintiff]." Id. Of particular importance to the Court was that "the Convention should be broadly interpreted," "when . . . read together with the FSIA[]." Id. at 1018. It is significant that Cargill was not seeking to enforce an arbitral award, but to determine whether it was a beneficiary of the contract and to enforce the arbitration agreement. Compare id. at 1017-18 with Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 577-79 (2d Cir. 1993) (enforcing arbitration award while distinguishing cases where plaintiff sought to have award enforced from cases in which there had been no award).

Cargill is applicable here, where the parties have allegedly entered into an agreement to arbitrate which is governed by the Convention and which is enforceable by the Court. See 991 F.2d at 1020 ("If [the plaintiff] is found to be a third party beneficiary to the Charter Party, it may be proper for the district court to enforce the arbitration agreement against [the defendant]"); see also 9 U.S.C. § 206 (allowing court to order arbitration under the FAA). According to Cargill, the FSIA must be read with the FAA to give the Convention a broad interpretation. Accordingly, the Court concludes that it has subject matter jurisdiction to determine

whether the parties entered into a binding charter party agreement that required arbitration in London.

2. Commercial Activities Exception

Alternatively, the Court has subject matter jurisdiction over the action pursuant to § 1605(a)(2) of the FSIA, which provides, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States in any case . . . in which the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Court concludes that Guangzhou's actions, taken in China, caused a "direct effect" in the U.S. and that those of its broker, Seagos, were taken "in connection with a commercial activity" of Guangzhou in China.

In order for an act taken "in connection with a commercial activity" to provide an exception to foreign sovereign immunity, it must be a "legally significant act." See Hanil Bank v. PT. Bank Negara Indonesia, --- F.3d ---, No. 97 Civ. 7961, 1998 WL 334362, at *6 (2d Cir. June 24, 1998); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993); MCW Machinery, Inc. v. Werkzeugmaschinenhandel GmbH IN Aufbau, 960 F. Supp. 734, 741 (S.D.N.Y. 1997). "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)

(quoting Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).

Here, Guangzhou negotiated a contract with Titan, a U.S. corporation, by faxes sent to Titan and both parties' brokers in the U.S. The act of making and directing this correspondence was "an act [taken] outside the . . . United States," "in connection with a commercial activity . . . elsewhere," that caused Titan allegedly to suffer a "direct effect" -- $1 million in damages -- in the U.S. See Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Co., No. 90 Civ. 4169, 1993 WL 541236, at *8 (S.D.N.Y. 1993).

That Guangzhou was "transacting business" with Titan in the U.S. and directing negotiations in this country is enough for it to have waived immunity under § 1605(a)(2) with respect to the formation of the charter party at issue here. See Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1113 (S.D.N.Y. 1982); see also Supra Med. Corp. v. McGonigle, 955 F. Supp. 374, 382 (E.D. Pa. 1997) (finding sufficient "intentional communications with [plaintiff] giv[ing] rise to the underlying suit"). Titan's identity as a U.S. corporation further strengthens this conclusion. See International Housing Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11 (2d Cir. 1989) (fact that plaintiff is "a U.S. corporation . . . is relevant to whether [its] financial losses . . . constituted

a 'direct effect'"); Note, Effects Jurisdiction Under the FSIA and the Due Process Clause, 55 N.Y.U. L. Rev. 474, 512 (1980).[8]

Because we find a "significant, legal connection" with the U.S. giving rise to Titan's claim, which caused a direct effect in the U.S., we have subject matter under the FSIA with respect to the formation of the charter party.[9]

B. Personal Jurisdiction

For the same reasons, we conclude that the Court has personal jurisdiction over Guangzhou. See Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (citations omitted); New York Bay Co. v. State Bank of Patiala, No. 93 Civ. 6075, 1994 WL 369406, at *4 (S.D.N.Y. July 12, 1994); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 n.3 (1989) ("personal jurisdiction, like subject matter jurisdiction, exists

[8] The cases relied on by defendant do not dictate a different result. In fact, in two of these cases, the Court of Appeals suggested that the actions of a broker could be sufficient to confer jurisdiction over a foreign sovereign defendant. See Stena Rederi AB v. Comision de Contratos, 923 F.2d 380, 389 (5th Cir. 1991); Gregorian v. Izvestia, 871 F.2d 1515, 1527-28 (9th Cir. 1989). The Court declined to find subject matter jurisdiction in these cases, however, because the relevant facts either had not been timely presented, see Gregorian, 871 F.2d at 1528, or had not been presented at all to the district court, see Stena Rederi, 923 F.2d at 389.

[9] It is not entirely relevant that Guangzhou did not initiate negotiations with Titan or solicit its business in the U.S. While a defendant that regularly does business in the U.S. will more easily be amenable to the general jurisdiction of this Court, with respect to the legal obligations arising out of the negotiation of the charter party, Guangzhou's communications, and those of its broker, are sufficient to establish subject matter jurisdiction.

only when one of the exceptions to foreign sovereign immunity . . . applies"). This is because under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). Since the Court has subject matter jurisdiction over the action and there is no dispute that defendant Guangzhou was properly served pursuant to 28 U.S.C. § 1608, the statutory requirements for personal jurisdiction are met.

The FSIA, however, "cannot create personal jurisdiction where the Constitution forbids it." Texas Trading, 647 F.2d at 308. Consequently, "[e]ach finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant." Id.; accord Seetransport, 989 F.2d at 580. Due Process requires that the foreign sovereign entity have "minimum contacts" with the United States "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted). In a case brought under the FSIA, a court may consider contacts beyond the forum state. See Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir. 1985) ("the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States"); see also Graham C. Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 130 (1983) ("it [is] reasonably clear that national -- not state --

contacts are decisive"). Moreover, "actions relevant to the [case] by an agent on [a] defendant['s] behalf" can support personal jurisdiction over a defendant. Texas Trading, 647 F.2d at 314.[10]

The Court concludes that it has personal jurisdiction over Guangzhou because Guangzhou hired Seagos, which is located in Connecticut, to broker the BIN HE, and which then directed communications at issue to Seabrokers and to Titan to negotiate the charter party. See Reed Int'l Trading Corp. v. Donau Bank AG, 866 F. Supp. 750, 755 (S.D.N.Y. 1994) (exercising personal jurisdiction over foreign sovereign defendant where defendant had appointed U.S. bank as "advising bank" for letters of credit at issue); Crimson Semiconductor, Inc. v. Electronum, 629 F. Supp. 903, 905, 908 (S.D.N.Y. 1986) (same, where defendant's representatives negotiated agreement in the U.S.). Moreover, there is evidence in the record to suggest that Guangzhou may have sent some of these communications directly to Seagos by fax from China. See Sealift Bulkers, Inc. v. Republic of Armenia, 965 F. Supp. 81, 85 (D.D.C. 1997) (personal jurisdiction where defendant used U.S. telecommunications systems to correspond with plaintiff); Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F. Supp. 688, 691 (S.D.N.Y. 1986) (same). Accordingly, Guangzhou's contacts with the

[10] While plaintiff bears the burden of establishing the Court's personal jurisdiction over the defendant, CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986), plaintiff need only make a prima facie showing that jurisdiction exists where, as here, there has been no evidentiary hearing. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996).

United States are sufficient to establish personal jurisdiction in this action. By appointing a representative in Connecticut to negotiate the charter party at issue in this case, Guangzhou "purposefully avail[ed] itself of the privilege of conducting activities with the [United States]." Waltover, 504 U.S. at 620 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (alterations in original). Guangzhou may not avail itself of U.S. clients, by directing communications to the U.S., without being held responsible for the content of these communications in the U.S. Accord Sealift, 965 F. Supp. at 85-86. Given its conduct, Guangzhou should reasonably have expected that it could be haled into court here, were it to break off negotiations, because it directed the negotiations here, through Seagos, and because Titan, the target of its negotiations, is located here. See Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Hanil Bank, 1998 WL 334342, at *8; see also Supra Medical, 955 F. Supp. at 382-83 ("[defendant] cannot now . . . complain about a suit concerning the effect of negotiations in the jurisdiction in which some of those negotiations occurred").[11]

[11] We find unavailing respondent's argument that its contacts cannot be measured by the activities of its broker. (See Resp. Reply Mem. at 2-4.) Guangzhou maintained a relationship with Seagos whereby Seagos would "perform[] the usual broker's role of collecting hire on a charter . . . . [by] passing messages back and forth between the parties to a transaction . . . and trying to smooth out trouble spots." (Chen Reply Aff. ¶¶ 2, 5.) Thus, Seagos played an "active role as an intermediary between (Guangzhou) and (Titan)," International Housing, 893 F.2d at 12, that can be taken into account when determining jurisdiction, regardless of whether Seagos is deemed Guangzhou's "broker," "agent," or "representative." See Interocean Shipping Co. v. National Shipping & Trading Corp., 523 F.2d 527, 537 (2d Cir. 1975) ("[i]t is immaterial that [the intermediary] thought of himself as a 'broker' and not an 'agent' . . . or that [defendant] did not intend to make [him] an agent"). Guangzhou does not anywhere question Seagos's authority to broker the arrangement at issue here. Cf. Story v. National Defence Soc. Council of the Republic of Indonesia-Jakarta, No. 95 Civ. 9663, 1997 WL 633485, at *2-3 (S.D.N.Y. Oct. 14, 1997) (considering whether signatories to promissory notes had actual or apparent authority from defendant); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 85-86 (S.D.N.Y. 1991) (finding that broker did not have authority to "fix vessels without [defendant's] approval").

III. Venue

We also hold that venue is proper in this Court under 28 U.S.C. § 1391(b). Under this section, "a civil action wherein jurisdiction is not founded solely on the diversity of citizenship . . . may, except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Despite its limiting language, courts have routinely held that § 1391(b) allows venue in more than one district. See Bates v. C & S Adjusters, 980 F.2d 865, 867 (2d Cir. 1992) ("the admonition against recognizing multiple venues has been disapproved"); TI, Inc. v. Quality Prods., Inc., 907 F. Supp. 752, 757 (S.D.N.Y. 1995) ("Venue is proper in each district that is the situs of a substantial part of the events or omissions giving rise to the claim.").

Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper. D'Anton Jos. S.L. v. Doll Factory, Inc., 937 F. Supp. 320, 321 (S.D.N.Y. 1996); French Transit, Ltd. v. Modern Coupon Systs., Inc., 858 F. Supp. 22, 24 (S.D.N.Y. 1994). Titan therefore bears the burden of establishing that a substantial part of the events giving rise to the lawsuit occurred in the Southern District of New York.

Titan argues that venue is proper here because the writings at issue were negotiated by means of facsimiles and telephone calls between Pelham, New York and Stamford, Connecticut. We agree. These faxes reflect "a substantial part of the events" giving rise to the present claim because the action alleges the creation of a binding charter party through these writings. See Sacody Tech., Inc. v. Avant, Inc., 862 F. Supp. 1152, 1157 (S.D.N.Y. 1994) (venue requirements "may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action"); see also Constitution Reins. Corp. v. Stonewall Ins. Co., 872 F. Supp. 1247, 1250 (S.D.N.Y. 1995) (venue proper in breach of contract action where contracts were negotiated through telephone calls and faxes between New York and Texas).

IV. Summary Determination of the Making of a Charter Party

Now that the Court has determined that jurisdiction and venue are proper, we must determine whether the parties have agreed to arbitrate the formation of the charter party. We hold that they did not. However, the parties did enter into a binding charter party, by which they agreed to arbitrate disputes in London, upon the election of either party. Because Titan has petitioned this Court to order arbitration, we order such arbitration to determine

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the parties' rights under the charter party, pursuant to Shell Time 4.

A. Ad Hoc Agreement to Arbitrate Existence of Charter Party

Guangzhou argues that the parties agreed to arbitrate the very existence of the charter party and, accordingly, that Titan's motion must be dismissed. We disagree. Given the evidence, we conclude that the parties did not enter into the "ad hoc" arbitration agreement advocated by Guangzhou.[11]

Because "arbitral jurisdiction is rooted in the consent of the parties," Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir. 1991), the existence of an agreement to arbitrate is a threshold question for a court to resolve, absent a clear and unmistakable delegation of that authority to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986); National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 135 (2d Cir. 1996); see also Maye v. Smith Barney Inc., 897 F. Supp. 100, 106 n. 3 (S.D.N.Y. 1995) ("the question of whether the parties ever made an agreement to arbitrate is . . . to be decided by the courts"). While due regard must be

[11] While Section 4 of the FAA directs the court to conduct an evidentiary hearing where the existence of an arbitration agreement is in dispute, see McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980), no such hearing is required here because the parties agree to the material facts at issue. See In re Stinnes Interoil, Inc., No. 87 Civ. 1371, 1989 WL 11489, at *4 (S.D.N.Y. Feb. 8, 1989).

given to federal policy favoring arbitration, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), where the parties contest the formation of an agreement, "any silence or ambiguity about whether such a question is arbitrable reverses the usual presumption that issues should be resolved in [arbitration's] favor." Ahran Landau Real Estate v. Benova, 123 F.3d 69, 72 (2d Cir. 1997) (citing First Options, 514 U.S. at 943). The question of the formation of the charter party, like that of any other contract, is a question of federal common law. See First Options, 514 U.S. at 943; Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987).

From the evidence, it is clear that the parties did begin negotiating an "ad hoc" arbitration agreement that contained terms different than the original charter party. According to the parties, on November 1 Seagos proposed arbitration to "resolve the dispute" as to whether the parties had made a binding charter. That same day, Titan proposed arbitration before a panel of three arbitrators in New York. However, the evidence also suggests that on November 2, Guangzhou cut off negotiations on the ad hoc agreement through Seagos, which, in response to Titan, stated that the "Shell Time 4" "is very clear on the [form of arbitration] which has been agreed by U.S. Titan. There is no need for a separate arbitration agreement." We find this language controlling; with it, Seagos, on behalf of Guangzhou, definitively ended negotiations on the "ad hoc agreement."[11] That it was Guangzhou's intent to end these negotiations is clear from its remaining correspondence, which called for London arbitration "pursuant to the Shell Time 4 clause 41." Cf. Northern Tankers Cyprus Ltd. v. Lesmar Corp., 781 F. Supp. 289, 290-91 (S.D.N.Y. 1992) ("agreement to arbitrate, separate and distinct from that contained in the charter party," was formed where plaintiff demanded arbitration "for damages caused by [defendant's] non-performance of the charter," and defendant accepted that demand). Because the parties' negotiations with respect to the "ad hoc" agreement did not come to fruition, we cannot order arbitration on the issue of whether the charter party was in fact formed.

B. The Charter Party

We do, however, order arbitration with respect to Guangzhou's alleged breach of the charter party, because we conclude that a

[11] We are unpersuaded by Guangzhou's suggestion that it referred to the "Shell Time 4" and "Canaro pro forma" because the parties were familiar with the terms of such agreements, and not because the parties were in fact bound by those agreements. (See Chen Aff. ¶ 18; Resp. Reply Mem. at 15-16.) As defendant concedes, a party is bound by the natural meaning of its words. From this correspondence, Titan could only conclude that Guangzhou was referring to the arbitration clause in the charter party, which had been duly negotiated by Seagos and Seabrokers. Thus, we do not agree that by referring to the "agreement," Titan meant the "ad hoc" agreement at issue here. (See Resp. Mem. at 16.) If anything, confusion as to which agreement was being referenced during negotiations cuts in Titan's favor, that no ad hoc agreement to arbitrate was formed. Where parties minds do not meet on the meaning of an essential term, no enforceable contract is formed. See, e.g., Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) (the famous "Peerless" case).

charter party providing for arbitration was formed. Whether a charter party has been formed is a question of fact. Sun Int'l Ltd. v. Toreador Petroleum Co., [illegible] The Court, however, may determine whether a charter party exists, if the underlying material facts are not in dispute. See Great Circle Lines, Ltd. v. Matheson & Co., 681 F.2d 121, 124 (2d Cir. 1982). As with any other contract, a charter party is formed when there is a "meeting of the minds" on its essential terms. Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673, 676 (2d Cir. 1972); A/S Custodia v. Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir. 1974). It is not necessary that the proposed charter be signed by either party, Id., and even an oral charter party is enforceable by a court of law, Great Circle Lines, 681 F.2d at 124 ("binding charter engagements have historically been assumed on nothing more formal than a nod of a head").

In any case, it is undeniable that charter parties can be and more often than not are formed by way of facsimile or telex. See Id.; In re J. Lauritzen A/S, No. 84 Civ. 8704, 1986 WL 13441, at *2 (S.D.N.Y. June 5, 1986). This is because "[t]he shipping industry is a fast moving . . . business, where dealings between the parties . . . are usually conducted . . . under severe time restraints." Great Circle Lines, 681 F.2d at 125. To arrange expeditiously what would otherwise be complicated and time consuming, "brokers [customarily] receive and send telex [or fax] traffic all over the world." Id. On the facts before us, the existence of a binding charter party is clear. The parties negotiated a charter through

their respective brokers, which was confirmed by facsimile on September 26, 1995 by Seagos, which "recap[ped] Owners and Charterers' agreement." A "recap" communication, or "fixture," is recognized throughout the shipping industry as an agreement to a charter party's essential terms. See Great Circle Lines, 681 F.2d at 125 & n.2; Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1345 (S.D.N.Y. 1988); see also P.E.P. Shipping (Scandinavia) ApS. v. Horanco Shipping Corp., No. 96 Civ. 3136, 1997 WL 358318, at *2 n.1 (E.D. La. June 24, 1997) ("[a] fixture presupposes a final contract with main terms set and final details to be resolved") (citing Great Circle Lines, 681 F.2d at 125 n.2); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 81 n.3 (S.D.N.Y. 1991)("[a] 'recap telex' recapitulates the terms of [a] fixture that have been agreed upon"). Thus, the "recap" fax represented an agreement as to the charter party's main terms, which

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We are equally unpersuaded by respondent's argument that John Baby's affidavit regarding industry custom should be ignored. "It is well established that testimony concerning trade practices and customs is admissible to enable the Court 'to evaluate the conduct of the parties.'" Oriental Commercial & Shipping Co. v. Rosseel, N.V., 709 F. Supp. 1085, 1015 (S.D.N.Y. 1988) (quoting Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505, 509 (2d Cir. 1977)). Mr. Baby is an experienced ship broker and one of Seagos's principals. He has personal knowledge not only of the negotiation of the charter party at issue, but the shipping industry as a whole. Moreover, "[c]ertain long-standing customs of the shipping industry [such as the procedure for brokering charter parties] are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract." Great Circle Lines, 681 F.2d at 125. Thus, had Titan not submitted a statement as to industry practice in this case, we would nevertheless consider it here. See Id.; see also Sanpun Corp. v. Khorastan Mashine Kar Co., 926 F. Supp. 436, 439 (S.D.N.Y. 1996) ("established practices and customs of the shipping industry inform the court's analysis" of the making of a charter party).

were in accordance with the Shell Time 4, a standard form charter. Accordingly, the parties had entered into a binding agreement as of September 26, 1995, which incorporated each of the Shell Time 4's terms. Cf. Sanpun, 926 F. Supp. at 441 ("[t]he legal effect of adopting [form charter] is inescapable"); Feystone Shipping Co. v. Compagnie Marocaine de Navigation, No. 89 Civ. 1028, 1990 WL 104029, at *2 (S.D.N.Y. July 19, 1990) (fixture incorporating form charter is binding where it "embodi[ed]" form).

Moreover, we do not agree with defendant that the charter did not come into effect because of the alleged failure of one of its "subjects," the approval of the charter by Titan's board of directors upon receiving the final inspection report of the BIN HE. First, this argument directly contradicts the weight of the evidence, which suggests that the Board did approve the BIN HE within the agreed time period. Second, even had this "subject" failed, it did not vitiate the charter that had already been formed. It is well established that a "subject detail" does not create a condition subsequent to a charter party. See Great Circle Lines, 681 F.2d at 126; In re Pollux Marine Agencies, Inc., 455 F. Supp. 211, 223 (S.D.N.Y. 1978). In our opinion, there existed a binding charter party between Titan and Guangzhou, in the form of "Shell Time 4," beginning September 26, 1995. Cf. E.A.S.T., Inc. of Stamford v. M/V Alaia, 673 F. Supp. 796, 800 (E.D. La. 1987) (charter not conditioned on plaintiff's acceptance of vessel because

charter formed upon agreement of main terms), aff'd, 876 F.2d 1168 (5th Cir. 1989).[11]

Because there exists a charter between the parties, Titan must arbitrate its dispute in London, according to the Shell Time 4. Cf. Interocean, 523 F.2d at 531 (form charter's arbitration clause bound parties where fixture telex adopted "Mobiltime form charter"); Keystone, 1990 WL 104029, at *4 (compelling arbitration where fixture provided that voyage be governed "per terms and conditions of the North American Grain charter party (pro forma 1982)," which contained arbitration clause); In re Polley, 455 F. Supp. at 213-14 (same, where defendant confirmed "having fixed the foll . . . subject details of Eldece Time," and aforesaid form charter had arbitration clause). The parties agreed to this form charter, as well as to the inclusion of an arbitration clause, until well after this dispute arose. As both parties were familiar to its form, it controls. See P.E.P. Shipping, 1997 WL 358118, at *3.

Moreover, even in the absence of a binding charter party, we would order arbitration in London under the Shell Time 4, because the parties agreed to arbitration in that forum by referencing that form charter while negotiating their own charter's terms. See Sansun, 926 F. Supp. at 441 ("A reference to a familiar charter party form which provides for arbitration . . . binds the parties to arbitrate any disputes [in the forum provided] . . . even though the formal charter party is not executed until later (or not at all)"). Respondent "was placed on notice, one way or the other," that disputes as to the charter party -- including formation -- could be arbitrated in London. Id. Thus, by ordering arbitration in London, the Court gives Guangzhou the benefit of its bargain.

[11] Nor do we agree that Titan rejected the BIN HE by its fax of October 19, 1995. This fax states only that it had "concerns" regarding the condition of the BIN HE that Guangzhou had already been working on. In any event, because we have determined that the parties entered into a binding charter party on September 26, 1995, any communication by Titan in October would have no effect on its terms.

CONCLUSION

For the foregoing reasons, we grant petitioner's motion for a summary determination as to the formation of a charter party; deny respondent's cross motion to dismiss for lack of jurisdiction and improper venue; deny respondent's application for attorney's fees; and grant respondent's motion to stay these proceedings to the extent consistent with this Opinion and Order. The parties are directed to arbitrate in London any other disputes arising under the time charter pursuant to the provisions of the Shell Time 4.

SO ORDERED.

Dated: White Plains, New York
August 5, 1998

William C. Conner
Senior United States District Judge

Mealey Publications, Inc., King of Prussia, PA. Vol. 13, #8, 8/98

MEALEY'S International Arbitration Report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. TITAN, INC.,

Petitioner,

- against -

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

96 Civ. 0936 (MCC)

OPINION AND ORDER

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Conner, Senior D.J.:

This case was recently before the Court on the motion of petitioner U.S. Titan, Inc. ("Titan") for a summary determination of the making of a binding charter party agreement between Titan and respondent Guangzhou Zhen Hua Shipping Co., Ltd. ("Guangzhou"), and to compel arbitration on Titan's claim for breach of contract, pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1. Guangzhou cross-moved to dismiss the action for lack of jurisdiction and improper venue under Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(3), or, in the alternative, to stay the proceedings pursuant to 9 U.S.C. § 3 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. Respondent Guangzhou now moves pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Local Civil Rule 6.3 "to alter and amend" this Court's Opinion and Order dated August 5, 1998, --- F. Supp.2d ---, 1998 WL 458175 (the "Opinion"),[1] familiarity with which is assumed.

BACKGROUND

In the Opinion, the Court held that the parties had entered into a binding charter party agreement, by which petitioner time-chartered the BIN HE, respondent's ocean-going Chinese-flag tanker, and which required arbitration of their disputes in London; granted petitioner's motion to compel arbitration in London; and denied respondent's cross-motion to dismiss or stay the action.[2] Our Opinion was based, in part, on the Court's conclusion that a binding charter party had been formed on September 26, 1995 when Seabrokers, pursuant to instructions from Seagos and/or Guangzhou,[3] sent a facsimile "recapping" the parties' agreement, despite petitioner's alleged failure to satisfy one of the three "'subjects,' or conditions" to the charter, namely that Titan's board of directors approve the charter within three (3) days of receiving an inspection report on the BIN HE.[4] Opinion at 3, 26.

---

[1] The Opinion was entered on August 7, 1998.

[2] The Court stayed the action to the extent that it ordered arbitration of Guangzhou's alleged breach of the charter party. It did not, however, stay the action with respect to the summary determination of the charter party.

[3] As discussed in the Opinion, Seabrokers brokered the arrangements to charter the BIN HE on behalf of petitioner Titan, while Seagos acted as Guangzhou's broker in the transaction. See Opinion at 2-3, 18 & n.11.

[4] The Court concluded that "the charter contained three 'subjects,' or conditions: (1) Titan's satisfactory inspection of the BIN HE; (2) the release of the vessel from its previous charterer, 'Canaro'; and (3) the approval of the charter party by Titan's board of directors within three days of the board's receipt of the . . . inspection report." Opinion at 3. The Court based its conclusion on the "recap" facsimile, or "fixture," which provided, among other things, the following:

> CP-
> SHELLTIME 4 TC, WITH MODS TO PRESENT TERMS AS AGREED.
>
> SUBJECTS-
> CP DET'LS, SATISFACTORY INSPECTION OF THE VSL AT DD, RELEASE BY OWNERS FROM CANARO TC, THENCE US TITAN BOD APPROVAL WITHIN 3 DAYS FOLLOWING RECEIPT OF THEIR DENHOLM INSPECTION REPORT.

Pet'r Exh. 1.

On August 18, 1998, respondent Guangzhou brought this motion to "alter and amend" the Opinion, claiming that it did "not fully identify the issues left open for consideration by the arbitrators" in London. Resp. Mem. of Law in Supp. of Mot. to Alter or Amend at 2. Specifically, respondent claimed that "it [would] not be clear to [the arbitrators] whether or not the Court's ruling has the effect of foreclosing them from deciding . . . that . . . [Guangzhou is] relieve[d] of its obligations under the charter." Id. at 3. Petitioner, on the other hand, urges the view that the Court's Opinion unambiguously and correctly limited the scope of the arbitrators' authority. The pivotal issue is whether the arbitrators may excuse the parties from their obligations under the charter in the event that one of the "'subjects,' or conditions" has not been satisfied.

DISCUSSION

I. Legal Standards

A motion "to alter or amend" a judgment under Fed. R. Civ. P. 59(e), or a motion for reconsideration or reargument under Local Civil Rule 6.3, provides the Court with an opportunity to correct manifest errors of law or fact, hear newly discovered evidence, consider a change in the applicable law or prevent manifest injustice. Marino v. United States, No. 97 Civ. 1884, 1998 WL 512958, at *2 (S.D.N.Y. Aug. 18, 1998) (slip copy); Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (same.); see also L. Civ. R. 6.3 (movant "shall . . . serve[] . . . a memorandum setting forth the matters or controlling decisions which counsel believes the court has overlooked"); cf. Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 170 F.R.D. 111, 113 (S.D.N.Y. 1997) (motion to reargue may be granted only where "the court overlooked the controlling decisions or factual matters that were placed before the court") (citations omitted); Anglo Am. Ins. Group, P.L.C. v. CalFed Inc., 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (moving party "must present matters or controlling decisions the court overlooked that might materially have influenced its earlier decision") (quoting Morser v. AT&T Info. Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989)); Polit v. Commissioner of the Dep't of Transp. of the City of New York, 687 F. Supp. 888, 890 (S.D.N.Y.) (same, with respect to motion to alter or amend under Rule 59(e)), aff'd, 858 F.2d 898 (2d Cir. 1988). The parties, however, may not address facts, issues, or arguments not previously presented to the court, Walsh v. McGee, 918 F. Supp. 107, 110 (S.D.N.Y. 1996), nor "reargue those issues already considered." In re Houbigant, Inc., 914 F. Supp. 997, 1001 (S.D.N.Y. 1996). Whether to grant or deny a motion for reconsideration or reargument is in the "sound discretion of a district court judge and will not be overturned on appeal absent an abuse of discretion." McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983) (Rule 59(e)); accord Boyle v. Stephens, Inc., No. 97 Civ. 1351, 1998 WL 80175, at *1 (S.D.N.Y. Feb. 25, 1998) (Local Rule 6.3) (citations omitted).

Respondent brings its motion to "alter and amend the Court's August 5, 1998 Opinion and Order" pursuant to Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3. Technically, a motion made pursuant to Local Rule 6.3 is a motion for "reconsideration or reargument," not a motion to "alter or amend." However, the legal standards governing these motions are essentially the same, as are the standards governing former Local Rule 3(j). See L. Civ. R. 6.3; First Financial Ins. Co. v. Allstate Interior Demolition Corp., No. 96 Civ. 8243, 1998 WL 567900, at *3 (S.D.N.Y. Sept. 3, 1998) (slip copy); Jones v. Trump, 971 F. Supp. 783, 785 n.2 (S.D.N.Y. 1997); Parkas v. Ellis, 783 F. Supp. 830, 832-33 & n.1 (S.D.N.Y.) (WCC), aff'd, 979 F.2d 845 (2d Cir. 1992). The motions are different in the respect that a motion made under Rule 59(e) is a motion to "alter or amend a judgment," which is "a decree and any order from which an appeal lies," Fed. R. Civ. P. 54(a), whereas a motion made pursuant to Local Rule 6.3 may seek revision of a ruling that is not yet final.

In this case, the Court has not yet entered judgment. Thus, we cannot consider respondent's motion as a motion to alter or amend a judgment under Rule 59(e). See RP Village Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1200-01 (2d Cir. 1987) ("a [final] order disposing of a motion is not effective until set forth on a separate document"; final "order that is part of a district court opinion . . . does not satisfy" separate-document requirement); cf. McCowan v. Sears, Roebuck and Co., 908 F.2d 1099, 1103 (2d Cir. 1990) (appealable interlocutory order "is no less a

judgment because no 'separate document' was filed pursuant to Fed. R. Civ. P. 58; Court, however, "assume[d] without deciding, that the requirements for an effective judgment set forth in Rule 58 must generally be satisfied before Court's jurisdiction can be invoked"). Accordingly, we consider respondent's motion under Rule 6.3. Cf. Virgin Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (district court properly considered defendant's "resubmitted" motion to dismiss as a motion for reconsideration under former Local Rule 3(j)).[5]

II. Reconsideration Under Local Rule 6.3

What respondent actually seeks is "clarification" of the Opinion, claiming that it will be unclear to the arbitrators whether they may excuse the parties' performance under the charter if respondent can prove that the "subjects" or conditions were not satisfied. We grant respondent's motion to the extent of specifying that the parties must arbitrate in London all disputes arising under the charter party. Thus, the arbitrators may determine whether the actions of either party, subsequent to the formation of the charter party, have vitiated the agreement. Any parts of our prior Opinion which suggested otherwise are hereby withdrawn.

---

[5] The Court notes that Local Rule 6.3 notwithstanding, it may revise an interlocutory order "at any time before the entry of [a final judgment]" under Fed. R. Civ. P. 54(b) where "'justice so demands.'" DC Comics, Inc. v. Powers, 482 F. Supp. 494, 496 (S.D.N.Y. 1979).

Section 4 of the FAA provides, "[i]f the making of [an] arbitration agreement or the failure, neglect, or refusal to perform the same [is at] issue the court shall proceed summarily to the trial thereof," and section 3, "the court . . ., upon being satisfied that [an] issue involved in [a] suit or proceeding is referable to arbitration under . . . an agreement, shall on application of one of the parties stay the trial of the terms of the agreement . . . ." 9 U.S.C. §§ 3, 4. Thus, under the FAA, the court may determine (1) whether the parties entered into an agreement to arbitrate; (2) whether one party to the agreement has failed, neglected or refused to arbitrate. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996). The court must then stay the remainder of the proceedings pending arbitration if some of the parties' claims are subject to arbitration. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); McMahan Sec. Co., L.P. v. Forum Capital Mkt., 35 F.3d 82, 86 (2d Cir. 1994); Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (court should hear only "issues relating to the making and performance of the agreement to arbitrate"). There is a strong public policy favoring arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

Here, the charter party, as reflected by the fixture recap, strongly suggests that the issue of whether the "subjects" to the charter party were satisfied is referable to arbitration. The fixture states that the "CP," or charter party, is the "Shell Time 4 TC, with subs to present terms as agreed," including "CP details, satisfactory inspection of the VSL at DD, release by owners from Caesar DC [and] . . . Titan BOD approval within 3 days following receipt of Denholm inspection report." (Pet'r Exh. 1.) The fixture recap thus by its terms incorporated the Shell Time 4 and the subjects at issue here, and accordingly, both became part of the agreement of September 26, 1995. See Opinion at 4 ("The Shell Time 4 Charter contain[s] an arbitration clause, providing for arbitration in London, at the election of either party."); Reliance Nat'l Ins. Co. v. Seismic Risk Ins. Services, Inc., 962 F. Supp. 385, 390 (S.D.N.Y. 1997) (where agreement "[o]n its face" incorporated second agreement containing arbitration clause, disputes under first agreement were covered by such clause).

The arbitration clause at issue, clause 41 of the Shell Time 4, is broad; it covers "[a]ny dispute arising under this charter." (Resp. Exh. 5 to Li Aff. ¶ 41 (b), (c)(i)(a)(1)]; cf. Hamilton Life Ins. Co. of New York v. Republic Nat'l Life Ins. Co., 291 F. Supp. 225, 227 (S.D.N.Y. 1968) ("Indeed, 'it would be hard to imagine an arbitration clause having greater scope than the one before us'"), aff'd, 408 F.2d 606 (2d Cir. 1969) (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 412 (2d Cir. 1959), cert. dismissed, 364 U.S. 801 (1960)). Where an

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arbitration clause is broad enough to encompass the disputed question, the court has no choice but to refer the controversy to arbitration in the agreed manner. See PaineWebber, 81 F.3d at 1200; McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 831 (2d Cir. 1988); National R.R. Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756, 762 (D.C. Cir. 1988); see also Rochdale Village Inc. v. Public Serv. Employees Union Local No. 80, 605 F.2d 1290, 1295 (2d Cir. 1979) ("[i]f a court finds that the parties have agreed to submit to arbitration . . . 'any and all disputes,' . . . the court will have exhausted its function, except to order . . . arbitration"); Consolidated Rail Corp. v. Metropolitan Transp. Auth., No. 95 Civ. 2142, 1996 WL 137587, at *10 (S.D.N.Y. March 22, 1996) ("[i]f the arbitration clause at issue is broad (e.g., providing for arbitration of all disputes 'arising under' the contract), then courts must presume that it was the parties' intent to arbitrate duration and direct that issue to the arbitrators"). Accordingly, a factual dispute as to whether one of the stated conditions has been satisfied, and the effect of such failure, are issues for the arbitrators, not the Court. Cf. Reliance Nat'l Ins., 962 F. Supp. at 389 (clause, "any dispute arising out of this Agreement," is "'elastic enough to encompass'" dispute arising from related agreement that "[was contingent upon" that agreement).

Indeed, it has been repeatedly held that even a dispute regarding the satisfaction of a condition precedent to a contract will be referred to arbitration if it may reasonably be said to

come within the scope of an arbitration clause. See, e.g., Capitol Vial, Inc. v. Meher Scientific, 966 F. Supp. 1108, 1111 (M.D. Ala. 1997) ("dispute over a condition precedent to a contract containing an arbitration clause that is broadly enough worded to encompass such a dispute should be arbitrated"); Town Cove Jersey City Urban Renewal, Inc. v. Procida Constr. Corp., No. 96 Civ. 2551, 1996 WL 337293, at *1 (S.D.N.Y. June 19, 1996) ("[w]hether . . . [a] condition precedent has been satisfied is a matter for the arbitrator to decide") (citing Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1511 (S.D.N.Y. 1985)); Hamilton Life Ins., 291 F. Supp. at 227 (broad arbitration clause was severable and therefore covered respondent's defenses, including "failure to comply with conditions precedent").

Conclusion

Respondent's motion is granted to the extent indicated in this Opinion. To any extent that our Opinion and Order of August 5, 1998 is inconsistent with this Opinion and Order, it is hereby withdrawn. The Clerk of the Court is directed to enter judgment in this case pursuant to Fed. R. Civ. P. 54 and 58, (1) denying respondent Guangzhou's motions to dismiss for lack of subject matter jurisdiction and (2) staying these proceedings pending arbitration. The parties are directed to arbitrate their disputes in London in accordance with the terms of the Shell Time 4 form, including whether any of the "subjects" or conditions to the September 16, 1995 charter party were unsatisfied and whether the parties were thereby excused from performance thereunder.

SO ORDERED.

Dated: White Plains, New York
September 29, 1998

William C. Conner
Senior United States District Judge

Mealey Publications, Inc., King of Prussia, PA. Vol. 13, #10, 10/98

MEALEY'S International Arbitration Report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

U.S. TITAN, INC.,

Petitioner,

- against -

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

- X

COPY

96 Civ. 0936 (WCC)

AMENDED OPINION AND ORDER

CONNER, Sr. D.J.:

The Opinion and Order, dated August 5, 1998, is hereby amended nunc pro tunc as follows:

→ Page 2, middle of first line, which reads "plaintiff" should read -- petitioner --

→ Page 3, second line from the bottom of the page (excluding the footnote), which reads "Titan" should read -- Seagos --

→ Page 3, footnote 4, first sentence, which reads "Defendant," should read -- Respondent, --

→ Page 4, second line from the bottom of the page, which reads "Seagos" should read -- Seabrokers --

→ Page 5, fifth line from the bottom of the page (excluding the footnote), which reads "Seabrokers" should read -- Seagos --

→ Page 5, end of second line from the bottom of the page (excluding the footnote), which reads "at all." should read -- at al[l]. --

→ Page 5, footnote 5, first sentence, which reads "Seagos" should read -- Seabrokers --

→ Page 6, sixth line from the top of the page, which reads "arbitration in accordance with Clause 41(c)." should read -- arbitration . . . in accordance with Clause 41(c) of the Shell Time 4 Canaro. --

→ Page 6, middle of seventh line, which reads "both parties'" should read -- "both sides" --

→ Page 16, footnote 7, middle of fourth line, which reads "15 n. 23" should read -- "15 n.23 --

→ Page 17, middle of sixth line from the bottom of the page (excluding the footnote), which reads "Seagos" should read -- Seabrokers --

→ Page 22, end of the fifth line from the bottom of the page, which reads "the ad hoc" should read -- the "ad hoc" --

→ Page 23, second line, which reads "ad hoc agreement." should read -- "ad hoc" agreement. --

→ Page 23, footnote 13, end of fifth line from the bottom of the page, which reads "no ad hoc agreement" should read -- no "ad hoc" agreement --

→ Page 25, second line, which reads "Seagos" should read -- Seabrokers --

→ Page 25, footnote 14, eighth line, which reads "and one of Seagos's principals." should read -- and was one of Seabrokers' principals. --

SO ORDERED.

Dated: White Plains, New York
September 25, 1998

William C. Conner
Sr. United States District Judge

Freedley (Marks Cohen)

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

U.S. TITAN, INC.,

96 Civ. 0936 (WCC)

Petitioner,

- against -

OPINION AND ORDER

GUANGZHOU ZHEN HUA SHIPPING CO., LTD.,

Respondent.

- X

5 August 1998
US

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Conner, Senior D.J.:

This case is currently before the Court on petitioner U.S. Titan, Inc.'s ("Titan") motion for a summary determination of the making of a binding charter party agreement between Titan and respondent Guangzhou Zhen Hua Shipping Co., Ltd. ("Guangzhou"), and to compel arbitration on Titan's claim for breach of contract, pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 4. Guangzhou has cross-moved to dismiss the action for lack of jurisdiction and improper venue under Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(3), or alternatively, to stay the proceedings pursuant to 9 U.S.C. § 3 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. (the "Convention").

For the reasons discussed below, the Court finds that the parties have entered into a binding charter party agreement that requires arbitration of their dispute; grants petitioner's motion to compel arbitration; and denies respondent's cross-motion to dismiss or stay the action.[1]

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[1] The Court will "stay" the action to the extent that it orders arbitration in London concerning Guangzhou's alleged breach of the charter party. See 9 U.S.C. § 3. It does not, however, stay the action with respect to the summary determination of a charter party.

BACKGROUND

The facts, according to plaintiff, are as follows. Titan is a corporation organized under the laws of Texas, with its principal place of business in Pelham, New York. Guangzhou is a state-owned corporation organized under the law of the People's Republic of China, with its principal place of business in Canton, China. At all pertinent times, Guangzhou owned and operated the M/T BIN HE (the "BIN HE"), an ocean-going Chinese-flag tanker.[2]

On or about August 22, 1995, the parties began negotiating a time charter[3] of the BIN HE, through their respective brokers -- Seagos Company, Inc. ("Seagos") of Stamford, Connecticut, on behalf of Guangzhou, and Seabrokers, Inc. ("Seabrokers"), also of

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[2] Guangzhou claims that it did not own the BIN HE and merely chartered it from Zhu Hai Shipping Enterprise Ltd., its true owner. (Chen Reply Aff. ¶ 9.) Whether Guangzhou was BIN HE's owner, however, has little if anything to do with its obligations under the alleged charter party. To the extent that ownership of the BIN HE may be relevant, it can be determined by the arbitrator, who, as we conclude, must decide all disputes arising under the charter party. See Dover S.S. Co. v. Summit Indus. Corp., 148 F. Supp. 206, 209 (S.D.N.Y. 1957); see also Tarstar Shipping Co. v. Century Shipline, Ltd., 451 F. Supp. 317, 321-22 (S.D.N.Y. 1978) (charter existed between parties that negotiated agreement, even though "owner's name . . . was not mentioned when the vessel was fixed and confirmed by telex"), aff'd, 597 F.2d 837 (2d Cir. 1979).

[3] A charter party is "a contract by which an entire ship or some principal part thereof is let to a merchant . . . ." Jhirad & Sann, 1 Benedict on Admiralty § 225 (7th ed. 1981). In a charter party, the terms and conditions of the lease of a vessel by an owner to a charterer are set out. Gilmore & Black, The Law of Admiralty § 4-1 (2d ed. 1975). With a time charter, "the owner[] . . . continues to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period." Id.

Stamford, on behalf of Titan. The charter contained three "subjects," or conditions: (1) Titan's satisfactory inspection of the BIN HE; (2) the release of the vessel from its previous charterer, "Camaro"; and (3) the approval of the charter party by Titan's board of directors within three days of the board's receipt of the final inspection report.[4] (See Pet'r Exh. 29.) On September 22, 1995, Guangzhou offered to charter the BIN HE to Titan for 12 months at $15,250 per day, with an option for an additional twelve months at $15,750 per day. During the next few days, the parties negotiated different periods and rates, as well as several other terms. Ultimately, on September 26, Guangzhou responded with a "firm counter offer" as follows:

> ". . . Accept/Except:
>
> Period - 6 mos. plus/minus 30 days at CHOPT
>
> CHOPT next 12 mos. . . .
>
> Rates - $15,250 first period
>
> Optional $15,750 second period."

(Pet'r Exh. 18.)

That same day, Titan informed Seabrokers that "Charterers are in agreement and accept Owner[']s last offer." (Pet'r Exh. 19.) Seabrokers then sent Titan a fixture telex "recap[ping] Owners and Charterers' agreement." (Pet'r Exh. 1.) The agreement was based

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[4] Defendant, on the other hand, takes the view that the board was to approve the proposed charter party within three days of the actual inspection of the BIN HE.

on the "Shelltime 4 Time Charter," a standard time charter, and contained the above subjects. (Id.) The Shell Time 4 Charter contained an arbitration clause, providing for arbitration in London, at the election of either party. (See Pet'r Exh. 4.)

Thereafter, the BIN HE was dry-docked in Hong Kong and inspected by Denholm Ship Management (Overseas) Ltd. ("Denholm"). On October 19, Titan received Denholm's initial report. (Warfield Aff. ¶ 16.) On October 23, Titan informed Seabrokers that it had concerns about the seaworthiness of the BIN HE, but that it was awaiting Denholm's final inspection report. (Id. ¶ 18 & Exh. 30.) Then, on October 25, Titan informed Seabrokers that it had received the full Denholm report and that it had "lift[ed its] inspection subject." (Pet'r Exh. 34.) It also stated that Titan "now look[ed] to [the] Owners to lift their Camaro withdrawal subject . . . [and that] the Titan board will make its decision within . . . three working days after the lifting of this subject per [the] 9/26 agreement." (Id.) On October 26, 1995, Seabrokers informed Titan that the BIN HE had been withdrawn from Camaro. (See Pet'r Exh. 20.) Titan thereupon replied that it would respond with board approval "by close of New York [business] Monday Oct. 30." On October 27, 1995, Titan notified Seabrokers that its board had approved the charter. (Pet'r Exh. 21.)

Guangzhou presents a slightly different version of events. According to Guangzhou, Titan rejected the BIN HE by its October 23 telex, which informed Seagos that the vessels' machinery spaces were "in terrible condition," and that the vessel was not "up to an

acceptable trading standard." (Chen Aff. ¶ 10 & Exh. 5.) Seagos informed Seabrokers that in view of Titan's rejection of the vessel, the conditions to which the charter had been subject had failed to occur. (Id. ¶ 10 & Exh. 6.)

Additionally, Guangzhou maintains that on October 24, Seabrokers confirmed that Titan had rejected the vessel, and that the subjects had therefore failed. (Id. ¶ 11 & Exh. 7.) Moreover, according to Guangzhou, on October 25, "Titan reversed its position and attempted to assert that the vessel had not failed the inspection." Guangzhou claims that it then terminated all negotiations with Titan. (Id. ¶ 13 & Exh. 9.)

On November 1, in a facsimile to Titan, Seagos suggested arbitration to resolve the dispute. (See id. ¶¶ 16-17 & Exh. 12.) Later that day, Titan proposed that the parties submit the matter "to three arbitrators in New York who would have 45 days . . . to issue a ruling on the threshold issue of whether the parties entered into a binding agreement on September 26 subject to conditions that were subsequently fulfilled." (Pet'r Exh. 39.) On November 2, Seabrokers responded that the "Shell Time 4 Camaro proforma is very clear on the simplified arbitration which has been agreed by U.S. Titan and is agreeable to Southern Shipping as well. There is no need for a separate arbitration agreement at all." (Pet'r Exh. 40.)[5] Titan then sent "formal written notice of

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[5] Titan claims that Seagos did not understand the reference to "Southern Shipping," and to have believed that the reference to "Shell Time 4 Camaro" referred to the charter between Guangzhou and Camaro, which, in part, was to be assumed by Titan. Guangzhou

Arbitration" to Seagos, advising it that arbitration was to follow "the Shell Time 4 clause 41(c) of Camaro/Titan Charter Party." (Pet'r Exh. 41.) On November 7, Titan sent a follow-up fax to Seagos, requesting confirmation that arbitration would be held under clause 41(c) of the charter party. (Pet'r Exh. 42.) Seagos replied, "London arbitration in accordance with Clause 41(c)." (Pet'r Exh. 43.) On November 9, Titan once again faxed Seagos, asking for confirmation that "arbitration proceedings in London are to [be] . . . in accordance with Clause 41(c) of the Shell Time 4 Guangzhou/Titan Proforma, which is based on the 'Camaro' Charter." (Pet'r Exh. 44.) Seagos replied that "both parties" had agreed to London arbitration "to ascertain whether there is a charter between Guangzhou . . . and . . . Titan." (Pet'r Exh. 45.) Titan then sent another fax to Seagos, stating that "arbitration in London is acceptable per the agreement." (Pet'r Exh. 46.)

Following these exchanges, the parties attempted to select a London arbitrator. In one such communication, sent directly from Guangzhou to Seabrokers, Guangzhou reiterated that it had agreed to submit the matter to arbitration "pursuant to the Shell Time 4 Clause 41." (Resp. Exh. 18.) No agreement was reached as to the identity of the arbitrators.

On February 7, 1996, Titan again wrote to Seagos. Among other things, the fax stated that Titan would "not agree to arbitration

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explains that the reference to Southern Shipping was a typographical error, due to the fact that Seagos also represents Southern Shipping in brokering charterers. (See Chen Reply Aff. ¶ 8.)

outside of the binding Titan/Guangzhou charter." (Pet'r Exh. 47 (emphasis in original).) Seagos did not reply. Instead, Titan received a fax from Guangzhou, which stated that Titan was "not allowed to be in breach of the ad hoc arbitration clause which is actually running." The fax also referred to an "alleged C/P." (Resp. Exh. 20.) Titan responded that since the parties could not agree on whether a valid charter party existed, it was "free to initiate this issue here [in New York]." (Piskora Aff. ¶ 12.)

DISCUSSION

Titan now petitions this Court pursuant to section 4 of the FAA (1) to determine summarily that there exists a binding charter between the parties and (2) to compel arbitration for breach of that agreement. For the reasons discussed below, the Court declines to dismiss the case for lack of jurisdiction or for improper venue, and holds that the parties have entered into a binding charter. Furthermore, the Court will compel arbitration in London to enforce the agreement.

I. Relevant Legal Standards

A. Motion to Dismiss Under Rules 12(b)(1), 12(b)(3)

On a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all factual allegations in the Complaint as true and "refrain from drawing inferences in favor of the party contesting jurisdiction." Serrano v. 900 5th Ave. Corp., --- F. Supp.2d ---, No. 97 Civ. 5829, 1998 WL 241623, at *1

(S.D.N.Y. May 13, 1998) (citing Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)). The Court is not confined to the Complaint, however. It may consider "evidence outside the pleadings, such as affidavits." Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991), vacated on other grounds, 505 U.S. 1215 (1992); accord Kamen v. AT&T, 791 F.2d 1006, 1011 (2d Cir. 1986).[6] Likewise, the Court may consider affidavits in deciding a Rule 12(b)(3) motion for improper venue. See ESI, Inc. v. Coastal Power Prod. Co., 995 F. Supp. 419, 422 (S.D.N.Y. 1998).

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[6] Thus, the standard for deciding a motion to dismiss for lack of subject matter jurisdiction is akin to that for summary judgment under Rule 56(e). Rule 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters sated therein . . . . The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion [] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . .

Rule 56(e) requires that the non-moving party oppose the motion with any of the evidentiary materials listed in Rule 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

B. Motion to Dismiss Under Rule 12(b)(2)

In determining a motion to dismiss for lack of personal jurisdiction, the Court also looks beyond the pleadings to affidavits submitted by the parties, considers the evidence in the light most favorable to the plaintiff, and resolves all doubts in its favor. PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). Prior to discovery, "the [plaintiff] need persuade the Court only that its factual allegations constitute a prima facie showing of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990).

II. Jurisdiction

Titan claims that there exists subject matter jurisdiction under § 9 of the FAA. Guangzhou, on the other hand, argues that it is immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). The Court concludes that it has subject matter jurisdiction under 28 U.S.C. § 1330(a), because Guangzhou waived its immunity under the FSIA.

A. Subject Matter Jurisdiction Under the FSIA

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. A defendant corporation that is owned entirely by a foreign state is also immune from the jurisdiction of

the Court. See id. §§ 1603(a), 1603(b)(2), 1604. If the immunity provisions of the FSIA are applicable, the Court is divested of subject matter jurisdiction over an action. NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2d Cir. 1993).

It is undisputed that defendant Guangzhou is wholly owned by the People's Republic of China. Therefore, in order for the Court to have jurisdiction over Titan's motion, there must be an applicable exception to foreign sovereign immunity under the FSIA. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 498 (1983). The burden is on Titan "to go forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (internal citations omitted). If an exception applies, the Court has subject matter jurisdiction over Guangzhou under 28 U.S.C. § 1330.

1. Arbitration Exception

The Court holds that Guangzhou has waived its immunity under § 1605(a)(6)(B) of the FSIA.[7] Section 1605(a)(6)(B) provides an exception to immunity in cases where a foreign state or sovereign entity has agreed to arbitrate a dispute and the arbitration

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[7] Although Titan has not raised § 1605(a)(6)(B) as a basis for subject matter jurisdiction, the Court may consider it sua sponte. See American Centennial Ins. Co. v. Seguros La Republica, S.A., No. 91 Civ. 1235, 1996 WL 304436, at *15 n. 23 (S.D.N.Y. June 5, 1996); Gabay v. Mostazafan Found. of Iran, 151 F.R.D. 250, 255 n.8 (S.D.N.Y. 1993) (citing Verlinden, 461 U.S. at 493 n. 20), aff'd, (2d Cir. 1994).

agreement is or may be governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. Congress has authorized the district courts to compel arbitration under the Convention in accordance with the agreement, including arbitration at sites outside the U.S. Id. § 203.

Here, Titan alleges that it entered into a charter party with Guangzhou that provided for arbitration in London, which is enforceable under the Convention. Guangzhou contends that the charter party was never formed, because Titan never completed the subjects precedent to the agreement. The U.S. and China are both parties to the Convention.

Cargill International S.A. v. M/T Pavel Dybenko is on point. In Cargill, the Second Circuit Court of Appeals considered whether a district court had subject matter jurisdiction to determine whether a charter party, which contained an arbitration clause, applied in a particular case between a sovereign-owned company an a plaintiff that was a third party to the charter. The Court hel that the district court had "jurisdiction to determir jurisdiction," and directed the court to consider "whatev evidence has been submitted" by the parties. 991 F.2d at 10

(citations omitted). The Court reasoned that regardless of whether there existed an agreement to arbitrate that could be enforced by the plaintiff -- the alleged beneficiary of the agreement -- the Court had jurisdiction to determine whether "the arbitration agreement in the Charter Party was intended to benefit [the plaintiff]." Id. Of particular importance to the Court was that "the Convention should be broadly interpreted," "when . . . read together with the FSIA[]." Id. at 1018. It is significant that Cargill was not seeking to enforce an arbitral award, but to determine whether it was a beneficiary of the contract and to enforce the arbitration agreement. Compare id. at 1017-18 with Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 577-79 (2d Cir. 1993) (enforcing arbitration award while distinguishing cases where plaintiff sought to have award enforced from cases in which there had been no award).

Cargill is applicable here, where the parties have allegedly entered into an agreement to arbitrate which is governed by the Convention and which is enforceable by the Court. See 991 F.2d at 1020 ("if [the plaintiff] is found to be a third party beneficiary to the Charter Party, it may be proper for the district court to enforce the arbitration agreement against [the defendant]"); see also 9 U.S.C. § 206 (allowing court to order arbitration under the FAA). According to Cargill, the FSIA must be read with the FAA t give the Convention a broad interpretation. Accordingly, the Cour concludes that it has subject matter jurisdiction to determir

whether the parties entered into a binding charter party agreement that required arbitration in London.

2. Commercial Activities Exception

Alternatively, the Court has subject matter jurisdiction over the action pursuant to § 1605(a)(2) of the FSIA, which provides, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the Unites states in any case . . . in which the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Court concludes that Guangzhou's actions, taken in China, caused a "direct effect" in the U.S. and that those of its broker, Seagos, were taken "in connection with a commercial activity" of Guangzhou in China.

In order for an act taken "in connection with a commercial activity" to provide an exception to foreign sovereign immunity, it must be a "legally significant act." See Hanil Bank v. PT. Bank Negara Indonesia, --- F.3d ---, No. 97 Civ. 7961, 1998 WL 334342, at *6 (2d Cir. June 24, 1998); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993); WMW Machinery, Inc. v. Werkzeugmaschinenhandel GmbH IM Aufbau, 960 F. Supp. 734, 741 (S.D.N.Y. 1997). "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)

(quoting Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).

Here, Guangzhou negotiated a contract with Titan, a U.S. corporation, by faxes sent to Titan and both parties' brokers in the U.S. The act of making and directing this correspondence was "an act [taken] outside the . . . United States," "in connection with a commercial activity . . . elsewhere," that caused Titan allegedly to suffer a "direct effect" -- $1 million in damages -- in the U.S. See Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Co., No. 90 Civ. 4169, 1993 WL 541236, at *8 (S.D.N.Y. 1993).

That Guangzhou was "transacting business" with Titan in the U.S. and directing negotiations in this country is enough for it to have waived immunity under § 1605(a)(2) with respect to the formation of the charter party at issue here. See Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1113 (S.D.N.Y. 1982); see also Supra Med. Corp. v. McGonigle, 955 F. Supp. 374, 382 (E.D. Pa. 1997) (finding sufficient "intentional communications with [plaintiff] giv[ing] rise to the underlying suit"). Titan's identity as a U.S. corporation further strengthens this conclusion. See International Housing Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11 (2d Cir. 1989) (fact that plaintiff is "a U.S. corporation . . . is relevant to whether [its] financial losses . . . constituted

a 'direct effect'"); Note, Effects Jurisdiction Under the FSIA and the Due Process Clause, 55 N.Y.U. L. REV. 474, 512 (1980).[8]

Because we find a "significant, legal connection" with the U.S. giving rise to Titan's claim, which caused a direct effect in the U.S., we have subject matter under the FSIA with respect to the formation of the charter party.[9]

B. Personal Jurisdiction

For the same reasons, we conclude that the Court has personal jurisdiction over Guangzhou. See Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (citations omitted); New York Bay Co. v. State Bank of Patiala, No. 93 Civ. 6075, 1994 WL 369406, at *4 (S.D.N.Y. July 12, 1994); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 n.3 (1989) ("personal jurisdiction, like subject matter jurisdiction, exists

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[8] The cases relied on by defendant do not dictate a different result. In fact, in two of these cases, the Court of Appeals suggested that the actions of a broker could be sufficient to confer jurisdiction over a foreign sovereign defendant. See Stena Rederi AB v. Comision de Contractos, 923 F.2d 380, 389 (5th Cir. 1991); Gregorian v. Izvestia, 871 F.2d 1515, 1527-28 (9th Cir. 1989). The Court declined to find subject matter jurisdiction in these cases, however, because the relevant facts either had not been timely presented, see Gregorian, 871 F.2d at 1528, or had not been presented at all to the district court, see Stena Rederi, 923 F.2d at 389.

[9] It is not entirely relevant that Guangzhou did not initiate negotiations with Titan or solicit its business in the U.S. While a defendant that regularly does business in the U.S. will more easily be amenable to the general jurisdiction of this Court, with respect to the legal obligations arising out of the negotiation of the charter party, Guangzhou's communications, and those of its broker, are sufficient to establish subject matter jurisdiction.

only when one of the exceptions to foreign sovereign immunity . . . applies"). This is because under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). Since the Court has subject matter jurisdiction over the action and there is no dispute that defendant Guangzhou was properly served pursuant to 28 U.S.C. § 1608, the statutory requirements for personal jurisdiction are met.

The FSIA, however, "cannot create personal jurisdiction where the Constitution forbids it." Texas Trading, 647 F.2d at 308. Consequently, "[e]ach finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant." Id.; accord Seetransport, 989 F.2d at 580. Due Process requires that the foreign sovereign entity have "minimum contacts" with the United States "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted). In a case brought under the FSIA, a court may consider contacts beyond the forum state. See Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir. 1985) ("the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States"); see also Graham C. Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 VA. L. REV. 85, 130 (1983) ("it [is] reasonably clear that national -- not state --

contacts are decisive"). Moreover, "actions relevant to the [case] by an agent on [a] defendant[']s behalf" can support personal jurisdiction over a defendant. Texas Trading, 647 F.2d at 314.[10]

The Court concludes that it has personal jurisdiction over Guangzhou because Guangzhou hired Seagos, which is located in Connecticut, to broker the BIN HE, and which then directed communications at issue to Seabrokers and to Titan to negotiate the charter party. See Reed Int'l Trading Corp. v. Donau Bank AG, 866 F. Supp. 750, 755 (S.D.N.Y. 1994) (exercising personal jurisdiction over foreign sovereign defendant where defendant had appointed U.S. bank as "advising bank" for letters of credit at issue); Crimson Semiconductor, Inc. v. Electronum, 629 F. Supp. 903, 905, 908 (S.D.N.Y. 1986) (same, where defendant's representatives negotiated agreement in the U.S.). Moreover, there is evidence in the record to suggest that Guangzhou may have sent some of these communications directly to Seagos by fax from China. See Sealift Bulkers, Inc. v. Republic of Armenia, 965 F. Supp. 81, 85 (D.D.C. 1997) (personal jurisdiction where defendant used U.S. telecommunications systems to correspond with plaintiff); Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F. Supp. 688, 691 (S.D.N.Y. 1986) (same). Accordingly, Guangzhou's contacts with the

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[10] While plaintiff bears the burden of establishing the Court's personal jurisdiction over the defendant, CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986), plaintiff need only make a prima facie showing that jurisdiction exists where, as here, there has been no evidentiary hearing. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996).

United States are sufficient to establish personal jurisdiction in this action. By appointing a representative in Connecticut to negotiate the charter party at issue in this case, Guangzhou "purposefully avail[ed] itself of the privilege of conducting activities with the [United States]." Weltover, 504 U.S. at 620 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (alterations in original). Guangzhou may not avail itself of U.S. clients, by directing communications to the U.S., without being held responsible for the content of these communications in the U.S. Accord Sealift, 965 F. Supp. at 85-86. Given its conduct, Guangzhou should reasonably have expected that it could be haled into court here, were it to break off negotiations, because it directed the negotiations here, through Seagos, and because Titan, the target of its negotiations, is located here. See Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Hanil Bank, 1998 WL 334342, at *8; see also Supra Medical, 955 F. Supp. at 382-83 ("[defendant] cannot now . . . complain about a suit concerning the effect of negotiations in the jurisdiction in which some of those negotiations occurred").[11]

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[11] We find unavailing respondent's argument that its contacts cannot be measured by the activities of its broker. (See Resp. Reply Mem. at 2-4.) Guangzhou maintained a relationship with Seagos whereby Seagos would "perform[] the usual broker's role of collecting hire on a charter . . . . [by] passing messages back and forth between the parties to a transaction . . . and trying to smooth out trouble spots." (Chen Reply Aff. ¶¶ 2, 5.) Thus, Seagos played an "active role as an intermediary between [Guangzhou] and [Titan]," International Housing, 893 F.2d at 12, that can be taken into account when determining jurisdiction, regardless of whether Seagos is deemed Guangzhou's "broker," "agent," or "representative." See Interocean Shipping Co. v.

III. Venue

We also hold that venue is proper in this Court under 28 U.S.C. § 1391(b). Under this section, "a civil action wherein jurisdiction is not founded solely on the diversity of citizenship . . . may, except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Despite its limiting language, courts have routinely held that § 1391(b) allows venue in more than one district. See Bates v. C & S Adjusters, 980 F.2d 865, 867 (2d Cir. 1992) ("the admonition against recognizing multiple venues has been disapproved"); PI, Inc. v. Quality Prods., Inc., 907 F. Supp. 752, 757 (S.D.N.Y. 1995) ("Venue is proper in each district that is the situs of a substantial part of the events or omissions giving rise to the claim.").

Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper. D'Anton Jos, S.L. v. Doll Factory, Inc., 937 F. Supp. 320, 321 (S.D.N.Y. 1996); French Transit, Ltd. v. Modern Coupon Systs., Inc., 858 F.

National Shipping & Trading Corp., 523 F.2d 527, 537 (2d Cir. 1975) ("[i]t is immaterial that [the intermediary] thought of himself as a 'broker' and not an 'agent' . . . or that [defendant] did not intend to make [him] an agent"). Guangzhou does not anywhere question Seagos's authority to broker the arrangement at issue here. Cf. Storr v. National Defence Sec. Council of the Republic of Indonesia-Jakarta, No. 95 Civ. 9663, 1997 WL 633405, at *2-3 (S.D.N.Y. Oct. 14, 1997) (considering whether signatories to promissory notes had actual or apparent authority from defendant); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 85-86 (S.D.N.Y. 1991) (finding that broker did not have authority to "fix vessels without [defendant's] approval").

Supp. 22, 24 (S.D.N.Y. 1994). Titan therefore bears the burden of establishing that a substantial part of the events giving rise to the lawsuit occurred in the Southern District of New York.

Titan argues that venue is proper here because the writings at issue were negotiated by means of facsimiles and telephone calls between Pelham, New York and Stamford, Connecticut. We agree. These faxes reflect "a substantial part of the events" giving rise to the present claim because the action alleges the creation of a binding charter party through these writings. See Sacody Tech., Inc. v. Avant, Inc., 862 F. Supp. 1152, 1157 (S.D.N.Y. 1994) (venue requirements "may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action"); see also Constitution Reins. Corp. v. Stonewall Ins. Co., 872 F. Supp. 1247, 1250 (S.D.N.Y. 1995) (venue proper in breach of contract action where contracts were negotiated through telephone calls and faxes between New York and Texas).

IV. Summary Determination of the Making of a Charter Party

Now that the Court has determined that jurisdiction and venue are proper, we must determine whether the parties have agreed to arbitrate the formation of the charter party. We hold that they did not. However, the parties did enter into a binding charter party, by which they agreed to arbitrate disputes in London, upon the election of either party. Because Titan has petitioned this Court to order arbitration, we order such arbitration to determine

the parties' rights under the charter party, pursuant to Shell Time 4.

A. Ad Hoc Agreement to Arbitrate Existence of Charter Party

Guangzhou argues that the parties agreed to arbitrate the very existence of the charter party and, accordingly, that Titan's motion must be dismissed. We disagree. Given the evidence, we conclude that the parties did not enter into the "ad hoc" arbitration agreement advocated by Guangzhou.[12]

Because "arbitral jurisdiction is rooted in the consent of the parties," Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir. 1991), the existence of an agreement to arbitrate is a threshold question for a court to resolve, absent a clear and unmistakable delegation of that authority to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986); National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 135 (2d Cir. 1996); see also Maye v. Smith Barney Inc., 897 F. Supp. 100, 106 n. 3 (S.D.N.Y. 1995) ("the question of whether the parties ever made an agreement to arbitrate is . . . to be decided by the courts"). While due regard must be

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[12] While Section 4 of the FAA directs the court to conduct an evidentiary hearing where the existence of an arbitration agreement is in dispute, see McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980), no such hearing is required here because the parties agree to the material facts at issue. See In re Stinnes Interoil, Inc., No. 87 Civ. 1371, 1989 WL 11409, at *4 (S.D.N.Y. Feb. 8, 1989).

given to federal policy favoring arbitration, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), where the parties contest the formation of an agreement, "any silence or ambiguity about whether such a question is arbitrable reverses the usual presumption that issues should be resolved in [arbitration's] favor." Abram Landau Real Estate v. Benova, 123 F.3d 69, 72 (2d Cir. 1997) (citing First Options, 514 U.S. at 943). The question of the formation of the charter party, like that of any other contract, is a question of federal common law. See First Options, 514 U.S. at 943; Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987).

From the evidence, it is clear that the parties did begin negotiating an "ad hoc" arbitration agreement that contained terms different than the original charter party. According to the parties, on November 1 Seagos proposed arbitration to "resolve the dispute" as to whether the parties had made a binding charter. That same day, Titan proposed arbitration before a panel of three arbitrators in New York. However, the evidence also suggests that on November 2, Guangzhou cut off negotiations on the ad hoc agreement through Seagos, which, in response to Titan, stated that the "Shell Time 4" "is very clear on the [form of arbitration] which has been agreed by U.S. Titan. There is no need for a separate arbitration agreement." We find this language controlling; with it,

Seagos, on behalf of Guangzhou, definitively ended negotiations on the "ad hoc agreement."[13] That it was Guangzhou's intent to end these negotiations is clear from its remaining correspondence, which called for London arbitration "pursuant to the Shell Time 4 clause 41." Cf. Northern Tankers Cyprus Ltd. v. Lexmar Corp., 781 F. Supp. 289, 290-91 (S.D.N.Y. 1992) ("agreement to arbitrate, separate and distinct from that contained in the charter party," was formed where plaintiff demanded arbitration "for damages caused by [defendant's] non-performance of the charter," and defendant accepted that demand). Because the parties' negotiations with respect to the "ad hoc" agreement did not come to fruition, we cannot order arbitration on the issue of whether the charter party was in fact formed.

B. The Charter Party

We do, however, order arbitration with respect to Guangzhou's alleged breach of the charter party, because we conclude that a

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[13] We are unpersuaded by Guangzhou's suggestion that it referred to the "Shell Time 4" and "Camaro pro forma" because the parties were familiar with the terms of such agreements, and not because the parties were in fact bound by those agreements. (See Chen Aff. ¶ 10; Resp. Reply Mem. at 15-16.) As defendant concedes, a party is bound by the natural meaning of its words. From this correspondence, Titan could only conclude that Guangzhou was referring to the arbitration clause in the charter party, which had been duly negotiated by Seagos and Seabrokers. Thus, we do not agree that by referring to the "agreement," Titan meant the "ad hoc" agreement at issue here. (See Resp. Mem. at 16.) If anything, confusion as to which agreement was being referenced during negotiations cuts in Titan's favor, that no ad hoc agreement to arbitrate was formed. Where parties minds do not meet on the meaning of an essential term, no enforceable contract is formed. See, e.g., Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) (the famous "Peerless" case).

charter party providing for arbitration was formed. Whether a charter party has been formed is a question of fact. Sun Int'l Ltd. v. Terrabo Petroleum Co., 747 F.2d 108, 110 (2d Cir. 1984). The Court, however, may determine whether a charter party exists, if the underlying material facts are not in dispute. See Great Circle Lines, Ltd. v. Matheson & Co., 681 F.2d 121, 124 (2d Cir. 1982). As with any other contract, a charter party is formed when there is a "meeting of the minds" on its essential terms. Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673, 676 (2d Cir. 1972); A/S Custodia v. Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir. 1974). It is not necessary that the proposed charter be signed by either party, id., and even an oral charter party is enforceable by a court of law, Great Circle Lines, 681 F.2d at 124 ("binding charter engagements have historically been assumed on nothing more formal than a nod of a head").

In any case, it is undeniable that charter parties can be and more often than not are formed by way of facsimile or telex. See id.; In re J. Lauritzen A/S, No. 84 Civ. 8704, 1986 WL 13441, at *2 (S.D.N.Y. June 5, 1986). This is because "[t]he shipping industry is a fast moving . . . business, where dealings between the parties . . . are usually conducted . . . under severe time restraints." Great Circle Lines, 681 F.2d at 125. To arrange expeditiously what would otherwise be complicated and time consuming, "brokers [customarily] receive and send telex [or fax] traffic all over the world." Id. On the facts before us, the existence of a binding charter party is clear. The parties negotiated a charter through

their respective brokers, which was confirmed by facsimile on September 26, 1995 by Seagos, which "recap[ped] Owners and Charterers' agreement." A "recap" communication, or "fixture," is recognized throughout the shipping industry as an agreement to a charter party's essential terms. See Great Circle Lines, 681 F.2d at 125 & n.2; Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1345 (S.D.N.Y. 1988); see also P.E.P. Shipping (Scandinavia) ApS. v. Noramco Shipping Corp., No. 96 Civ. 3136, 1997 WL 358118, at *2 n.1 (E.D. La. June 24, 1997) ("[a] fixture presupposes a final contract with main terms set and final details to be resolved") (citing Great Circle Lines, 681 F.2d at 125 n.2); In re Herlofson Mgmt. A/S, 765 F. Supp. 78, 81 n.3 (S.D.N.Y. 1991)("[a] 'recap telex' recapitulates the terms of [a] fixture that have been agreed upon").[14] Thus, the "recap" fax represented an agreement as to the charter party's main terms, which

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[14] We are equally unpersuaded by respondent's argument that John Raby's affidavit regarding industry custom should be ignored. "It is well established that testimony concerning trade practices and customs is admissible to enable the Court 'to evaluate the conduct of the parties.'" Oriental Commercial & Shipping Co. v. Rosseel, N.V., 702 F. Supp. 1005, 1015 (S.D.N.Y. 1988) (quoting Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505, 509 (2d Cir. 1977)). Mr. Raby is an experienced ship broker and one of Seagos's principals. He has personal knowledge not only of the negotiation of the charter party at issue, but the shipping industry as a whole. Moreover, "[c]ertain long-standing customs of the shipping industry [such as the procedure for brokering charter parties] are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract." Great Circle Lines, 681 F.2d at 125. Thus, had Titan not submitted a statement as to industry practice in this case, we would nevertheless consider it here. See id.; see also Samsun Corp. v. Khozestan Mashine Kar Co., 926 F. Supp. 436, 439 (S.D.N.Y. 1996) ("established practices and customs of the shipping industry inform the court's analysis" of the making of a charter party).

were in accordance with the Shell Time 4, a standard form charter. Accordingly, the parties had entered into a binding agreement as of September 26, 1995, which incorporated each of the Shell Time 4's terms. Cf. Samsun, 926 F. Supp. at 441 ("[t]he legal effect of adopting [form charter) is inescapable"); Keystone Shipping Co. v. Compagnie Marocaine de Navigation, No. 89 Civ. 1028, 1990 WL 104029, at *4 (S.D.N.Y. July 19, 1990) (fixture incorporating form charter is binding where it "embodi[ed]" form).

Moreover, we do not agree with defendant that the charter did not come into effect because of the alleged failure of one of its "subjects," the approval of the charter by Titan's board of directors upon receiving the final inspection report of the BIN HE. First, this argument directly contradicts the weight of the evidence, which suggests that the Board did approve the BIN HE within the agreed time period. Second, even had this "subject" failed, it did not vitiate the charter that had already been formed. It is well established that a "subject detail" does not create a condition subsequent to a charter party. See Great Circle Lines, 681 F.2d at 126; In re Pollux Marine Agencies, Inc., 455 F. Supp. 211, 223 (S.D.N.Y. 1978). In our opinion, there existed a binding charter party between Titan and Guangzhou, in the form of "Shell Time 4," beginning September 26, 1995. Cf. E.A.S.T., Inc. of Stamford v. M/V Alaia, 673 F. Supp. 796, 800 (E.D. La. 1987) (charter not conditioned on plaintiff's acceptance of vessel because

charter formed upon agreement of main terms), aff'd, 876 F.2d 1168 (5th Cir. 1989).[15]

Because there exists a charter between the parties, Titan must arbitrate its dispute in London, according to the Shell Time 4. Cf. Interocean, 523 F.2d at 531 (form charter's arbitration clause bound parties where fixture telex adopted "Mobiltime form charter"); Keystone, 1990 WL 104029, at *4 (compelling arbitration where fixture provided that voyage be governed "per terms and conditions of the North American Grain charter party (pro forma 1982)," which contained arbitration clause); In re Pollux, 455 F. Supp. at 213-14 (same, where defendant confirmed "having fixed the foil . . . subject details of Eldece Time," and aforesaid form charter had arbitration clause). The parties agreed to this form charter, as well as to the inclusion of an arbitration clause, until well after this dispute arose. As both parties were familiar to its form, it controls. See P.E.P. Shipping, 1997 WL 358118, at *3.

Moreover, even in the absence of a binding charter party, we would order arbitration in London under the Shell Time 4, because the parties agreed to arbitration in that forum by referencing that form charter while negotiating their own charter's terms. See Samsun, 926 F. Supp. at 441 ("A reference to a familiar charter

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[15] Nor do we agree that Titan rejected the BIN HE by its fax of October 19, 1995. This fax states only that it had "concerns" regarding the condition of the BIN HE that Guangzhou had already been working on. In any event, because we have determined that the parties entered into a binding charter party on September 26, 1995, any communication by Titan in October would have no effect on its terms.

party form which provides for arbitration . . . binds the parties to arbitrate any disputes [in the forum provided] . . . even though the formal charter party is not executed until later (or not at all)"). Respondent "was placed on notice, one way or the other," that disputes as to the charter party -- including formation -- could be arbitrated in London. Id. Thus, by ordering arbitration in London, the Court gives Guangzhou the benefit of its bargain.

CONCLUSION

For the foregoing reasons, we grant petitioner's motion for a summary determination as to the formation of a charter party; deny respondent's cross motion to dismiss for lack of jurisdiction and improper venue; deny respondent's application for attorney's fees; and grant respondent's motion to stay these proceedings to the extent consistent with this Opinion and Order. The parties are directed to arbitrate in London any other disputes arising under the time charter pursuant to the provisions of the Shell Time 4.

SO ORDERED.

Dated: White Plains, New York
August 5, 1998

William C. Conner
Senior United States District Judge